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No.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ORLON R. HILL,

Petitioner

vs.

UNITED STATES ARMY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT AND THE
MERIT SYSTEMS PROTECTION BOARD

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Was Petitioner denied the ability to meet his burden of proof in the first whistleblowing defense case because: (1) the MSPB Judge erred by not first reading the Petitioner's Hearing Exhibit "A" (listing several major and specific whistleblowing instances, senior officials, and reprisals received by Petitioner) and then she denied all whistleblowing witness both prior to the Merit Systems Protection Board hearing; (2) then disallowed questioning of all other called witnesses during the hearing about reprisals against Petitioner; (3) then confesses at the end of the hearing that she had not even read Petitioner's Hearing Exhibit; (4) then the Judge making an erroneous initial decision against Petitioner?

Should Petitioner's Individual Right of Action Appeal then be denied by the Merit Systems Protection Board and the United States Court of Appeals for the Federal Circuit on basis of *res Judicata?*

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SUPREME COURT OF THE UNITED STATES

October Term, 1993

Orlon R. Hill, Petitioner	)
vs.	)
United States Army, Respondent	)

PETITION FOR WRIT OF CERTIORARI
.UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Petitioner, Orlon R. Hill, respectively prays that a writ of certiorari be issued to review the judgement and opinion of the United States Court of Appeals for the Federal Circuit to reverse that decision affirming Merit Systems Protection Board's dismissal of MSPB DOCKET NO DA-1221-92-0394-W-1, Individual Right of Action Appeal, (which started with previous MSPB DOCKET DA7529110549 that consisted of concurrent multiple and interrelated affirmative defenses) on the basis of res Judicata. Petitioner was wrongfully demoted because of his whistleblowing and has been

denied by the courts of his right to present this affirmative defense. This is the last chance for Justice to prevail. In the first action, the Administrative Judge denied Petitioner from interviewing whistleblowing witnesses and reasonably presenting his case.

OPINIONS BELOW

The opinion of the Court of Appeals dated 19 Apr 1993 appears at pages 1-9 of attached Appendix A.

The initial MSPB decision dated 30 Jun 1992 is at pages 1-16 of attached Appendix B.

The final MSPB decision dated 5 Nov 92 is at pages 17-19 of attached Appendix B.

JURISDICTION

The Court of Appeals Opinion in this matter was filed April 19, 1993. This Courts jurisdiction is invoked under Title 28, U.S.C. section 1254(1).

STATEMENT OF THE CASE

In Sep-Oct 1989, the Army Deciding Official (and Petitioner's 3 level supervisor)

was informed by the Fort Hood Civilian Personnel Officer that sexual harassment by a male branch chief was ongoing in Petitioner's Division. This information originated from the Civilian Personnel Officer's wife that worked in the Division until June 1990.

The Deciding Official, Civilian Personnel Officer, and Petitioner's supervisors took no action to stop the harassment or inform the Petitioner of it. In early Feb 1990, Petitioner was called names and severely criticized by COL Baucum in a note to Petitioner's 2nd level supervisor who was also a long term friend of COL Baucum. This criticism related to Petitioner's assigned mission and duties relating to the Commercial Activities (CA) Program, an official US Army mission.

By early May 1990, the Petitioner was suffering from major clinical depression caused by work pressures and advised his supervisors and employees that he was in a Doctor's care.

Employees advised Petitioner's supervisors that Petitioner was treating them differently however supervisors took no action to assist Petitioner.

Also in early May, the Petitioner was advised (for the first time) by his 1st level supervisor that the branch chief was harassing one female employee in the Division and others elsewhere within the Directorate. Petitioner immediately recommended that the branch chief be removed at once from the Division work area which was denied by his 1st, 2nd, and 3rd level supervisors.

At the same time in early May 1990, Petitioner was directed by his 1st and 2nd level supervisors not to speak to employees about the ongoing sexual harassment or take any action to stop it. An AR 15-6 Investigation conducted by an outside person had been ordered under and by authority of Petitioner's 3rd level supervisor that also was the Deciding Official. Petitioner was directed by his

supervisors not to discuss anything about the sexual harassment or interfere with the "Official Investigation" or he would suffer severe adverse action.

In early Aug 1990, Petitioner was informed (for the first time) by an EEO Counselor that 2 EEO complaints involving sexual harassment of several females was also being investigated in Petitioner's Division of 14 personnel simultaneously with the AR 15-6 investigation.

In early Sep 1990, Petitioner presented a letter to his 1st and 2nd level supervisors from his Doctor strongly urging 4 weeks of psychotherapy for the Petitioner.

In mid Sep 1990, the AR 15-6 Investigation was completed after 4 months duration and the guilty branch chief was only then relocated from the Division work area to another job. A report copy furnished to the Petitioner 9 months later indicated Petitioner was not negatively implicated in any way.

Petitioner attended 4 weeks of

psychotherapy during Oct 1990.

Upon returning to work in late Oct 1990; Petitioner was relieved from his position as Division Chief and relocated to a small office cubical located within a busy hallway. Petitioner was punished although no investigations about him had been conducted.

In mid Nov 1990, the first USACARA investigation of sexual harassment complaints by 3 female employees of Petitioner was conducted with Petitioner being a designated Responding Official.

In mid Dec 1990, the second USACARA EEO investigation concerning a fourth female employee was conducted with Petitioner as Responding Official.

During the Christmas Season 1990, Petitioner accidently witnessed COL Baucum in an early morning rendezvous with a female employee.
Petitioner reported this incident to the Fort Hood Inspector General in mid Feb 1991 because

announcement had been made that COL Baucum would replace his current 3rd level supervisor (COL Glosson) in Jun 1990.
Based on earlier reprisals by COL Baucum, Petitioner feared further reprisals from him.

In early and mid Feb 1991, two USACARA final reports were issued implicating reprisals by several unnamed managers within the Directorate. The female employees had previously charged 4 managers in their EEO complaints. These 4 named managers were the Petitioner's 1st & 2nd level supervisors, the Petitioner, and 1 of Petitioner's subordinate supervisors.

Petitioner was served a letter in mid Mar 1991 by his 2nd level supervisor (COL Templer) as Recommending Official. The letter recommended the Petitioner be permanently removed from his Division Chief position and downgraded from GM13 to GS11. The principle justification was that the Petitioner had created a hostile and threatening environment;

and had not taken action to protect the harassed females. This letter was presented approximately 6 weeks after Petitioner filed a whistleblowing IG complaint against COL Baucum for the early morning rendezvous.

A response to the recommended downgrade was submitted by the Petitioner to the Deciding Official who was also his 3rd level supervisor in early Apr 1991. The Petitioner documented and claimed; (1) he was rendered powerless by his supervisors from taking action to resolve the hostile environment and protect the victims, (2) his 1st, 2nd, and 3rd level supervisors had assumed control of the work area therefore creating the hostile environment themselves) by delaying completion of AR 15-6 Investigation and requiring the harasser to remain with the victims in work area for 4 months, (3) he was working at diminished capacity because of major clinical depression and inherited polyneuropathies in throat and muscles.

The Deciding Official sustained in early May 1990 the recommendation to downgrade and otherwise punish the Petitioner stating: (1) There was no record or knowledge of Petitioner's handicap (2) Petitioner was attempting to blame others for not protecting the sexual harassment victims.

On 10 Jun 92, Petitioner made his initial appeal (first action) to the Dallas Regional MSPB citing whistleblowing, handicap, unauthorized personnel practices, and harmful error as affirmative defenses.

On 19 Jul 91, Petitioner submitted his first amendment to the 10 Jun 91 appeal elaborating on Petitioner's long term whistleblowing and resulting reprisals.

On 15 Sep 1991, Petitioner's submitted his Hearing Exhibit "A" to the MSPB citing minute whistleblowing details and reprisals received with names of senior officials, places, dates, evidence, and applicable US statutory codes. Also a separate letter listing names and

justification for all required whistleblowing defense witnesses was forwarded to MSPB on 15 Sep 1991.

Before hearing began on 25 Sep 1991, the AJ issued her memorandum of conference and rulings which surprisingly disapproved all requested whistleblowing witnesses. Off record, the AJ stated the hearing about whistleblowing would take too long.

During the hearing on 25 and 27 Sep 1991, the AJ appeared hostile and repeatedly ordered Petitioner's representative not to question any witness about whistleblowing instances and reprisals. She permitted whistleblowing questions only to the Deciding Official. Other witnesses having first hand knowledge that were questioned were directed by her not to respond.

In the closing minutes of the last day of hearing on 27 Sep 1991, the AJ confessed on the record that up until that time, she had not read Petitioner's Hearing Exhibit "A" submitted to her on 15 Sep 1991.

Then Petitioner realized the Judge's massive error for the first time and understood why she had been hostile and disapproved all defense whistleblowing witnesses. There was no way for Petitioner to compensate for her massive error at the hearing close.

After the MSPB initial decision on 10 Oct 1991, and although still recovering from major clinical depression, the Petitioner appealed to the Board pro se in early Nov 1991 because his representative had been seriously ill for months.

Petitioner had furnished copies of the total file of appeals to the Office of Special Counsel (OSC). The Petitioner received two letters dated 15 Jan 1992 completing their investigation and recommending that a Right of Action Appeal (second action) be submitted to MSPB.

The MSPB final decision dated 24 Jan 1992 was issued denying Petitioner's appeal without first considering two Office of Special Counsel

letters, (both dated 15 Jan 1992) about Petitioners case.

The Right of Action Appeal (second action) was submitted to Washington MSPB in good faith per the OSC recommendation by the Petitioner on 6 Mar 1992. By then, the Petitioner's medical condition had improved and most AJ errors in the first action were realized by him and were enumerated to the Board.

As requested by Fort Hood, the Dallas Regional MSPB on 18 May 1992 issued a show cause order to not dismiss the second action res Judicata because MSPB had addressed the whistleblowing and a decision had previously been made in first action.

Petitioner's 22 May 1992 response to the MSPB show cause order elaborately detailed most of the AJ's massive errors thus detailing that the Petitioner had been denied the opportunity to question whistleblowing witnesses in the first action.

The initial MSPB decision to dismiss the

second action due to res Judicata was issued on 30 Jun 1992.

Petitioner appealed the dismissal of the second action on basis of res Judicata to the MSPB Board on 30 July 1992 and the full Board affirmed the dismissal on 5 Nov 1992.

Petitioner's appeal was docketed in late Nov 1992 and his informal brief was forwarded to the Appeals Court on 7 Dec 1992.

The Appeals Court affirmed the dismissal of the second action on 19 Apr 1993 stating;

> "However, the decision in the first case is not an issue here."

The Appeals Court then repeated erroneous conclusions from the AJ in the first action.

REASONS FOR GRANTING THE WRIT

The appeals court decision has disputed the accepted and usual course of judicial procedures thereby sanctioning such a departure by the Merit Systems Protection Board as to call for the power of supervision by the Supreme Court of the United States. The

Petitioner has been previously denied and should be afforded the opportunity to reasonably present his whistleblowing case in court.

In MSPB DOCKET DA7529110549, COL Baucum (Director of G3/DPTM over Range Division) and a subordinate colonel wrote derogatory notes at Appendix A, pages 10&13, to COL Templer on 2 Feb 90 about Petitioner's "half-assed, his henchmen, overzealous, misinformation, poking nose, which we've had to stiff arm him before" due to Petitioner's performance of the Commercial Activities (CA) Program Management Mission. Since COL Templer (Petitioner's recommending official and 2nd line supervisor) and his designated new Commander (COL Baucum) were associates since college, these false and derogatory notes about Petitioner performing his official CA Program Management duties prejudiced Petitioner's Recommending Official, COL Templer, who later on 22 Mar 91 singled out Petitioner for demotion on unrelated charges

which seemingly were not related to Petitioner's performance of the CA Program Management Mission. Whistleblowers such as the Petitioner have experienced and easily recognized his supervisors use of the Guide to Retaliation by Roy C. Bartholomae published in July 91 at pages 14-15 Appendix A. The outline often used by supervisors for retaliation is:

> "Be very patient. Allow time (years if necessary) between the whistleblowing incident and the beginning of retaliation, so that it is almost impossible to link the two."
> "Wait for, or create windows of opportunity for retaliation."
> "Never attack on a front where the whistleblower has an acceptable or proven track record."
> "Regular inoculations against scruples are also very helpful."

Petitioner was informed by supervisors in 1 May 90 that a subordinate branch chief (John Hamlin) was sexually harassing female division employees. COL Glosson confessed he had previously known about Hamlin's sexual harassment since Sep-Oct 89, Appendix A, pages 16-19 by stating:

"He (the Civilian Personnel Officer, Mr. Jim Hiltz) would.... we had periodic update ".
"I think he told me one time, just mentioned that, you know, "she's hearing this."
"October, November of.... '89."

Prior to 1 May 90, COL Glosson had not previously informed Petitioner and did not himself take any immediate action to protect the victims. Having knowledge of the harassment; COL Glosson as the Garrison Commander, was required to take immediate action per 29 CFR chapter XIV, Part 1604, Section 1604.11. COL Glosson himself therefore became he primary responsible authority instead of Petitioner because subparagraph (a)(3) of section 1604.11 states:

"such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."

On 1 May 1990, acting as Division Chief, Petitioner strongly and immediately recommended that John Hamlin be removed at once from the work area however COL Templer and COL Glosson

refused, per following quotes in MSPB DOCKET DA7529110549 by Judge Malouf in extract of her initial 10 Oct 91 decision at Appendix A, pages 24-26:

> "In response, the appellant argued that the agency refused to move Hamlin out of the division during the pendency of the AR 15-6 investigation and refused to allow the appellant to talk with his subordinate employees about the situation. The appellant's contentions are supported by the record and by the testimony of COL Thomas Templer, the Director of Resource Management, and by the testimony of Mr. Bikoski."
> "There is nothing in the record to establish that higher management made any effort to alleviate the tensions and problems in AOERD."
> "Given Hamlin's continued presence in the division, it would have been impossible for the appellant to have completely shielded Jackson, Phipps, and Remick from Hamlin"

The decision by petitioner's supervisors leaving Hamlin in the work area for 4 additional months violated female employees rights for immediate protection per 29 CFR Chapter XIV Section 1604.11.

Subparagraph (d) of this reference states:

> "With respect to conduct between fellow employees, an employer is responsible for

> acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took **IMMEDIATE and APPROPRIATE CORRECTIVE ACTION."**

This reference was discussed with Judge Malouf during the MSPB hearing pges 27-28, Appendix A. **In the close work environment; removal of Hamlin from the work area was the only feasible way to provide immediate suitable protection for his victims of sexual harassment.**

Yet Judge Malouf made a major error in her decision extract page 29-31, appendix A by concluding:

> "The Appellant did not cite any law or regulation that required the agency remove Hamlin from the workplace prior conclusion of the AR 15-6 investigation."

Even Judge Malouf agreed that Petitioner had been rendered powerless by his supervisors and could effectively do nothing to resolve the hostile environment.

On 12 Feb 91, Petitioner filed a handwritten whistleblowing complaint at Appendix A, page 32-33, with the Fort Hood

Inspector General because COL Baucum had just been announced as the new Garrison Commander to replace COL Glosson in early Jun 1991. This action would make COL Baucum the 3rd level supervisor of Petitioner. Six weeks before the 12 Feb 91 complaint; COL Baucum was witnessed by Petitioner having an illicit rendezvous with his female employee as described in Hearing Exhibit "A" at Appendix A, page 46-51. Petitioner believed the Fort Hood Commanding General should be informed by the Inspector General because COL Baucum's illicit activity would cause embarrassment to the Army. In her 10 Oct 91 decision extract for MSPB DOCKET DA7529110549 at Appendix A, pages 139-140, Judge Malouf stated:

> "The record establishes that the appellant reasonably believed that such conduct by Colonel B. constituted a violation of the Uniform Code of Military Justice contained in Title 10 of the United States Code. I find that under the instant circumstances, the appellant's disclosure was protected and constituted whistleblowing."

In addition, Petitioner had already received reprisals because of COL Baucum's

notes at Appendix A, pgs 10-13, received a year earlier. Petitioner expected more reprisals from COL Baucum, his new 3 level supervisor, because of previous reprisals and his nasty reputation.

COL Templer did not provide whistleblowing protection to the Petitioner as required by Sec 2 PL102-12(a) which states:

> "(a) FINDINGS.- The Congress finds that-
> (1) Federal Employees who make disclosures described in Section 2302(b)(8) of Title 5, United States Code, serve the public interest by assisting in the determination of fraud, waste, and unnecessary Government expenditures;
> (2) protecting employees who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service;"

Six weeks after the Petitioner's Inspector General whistleblowing complaint about COL Baucum, the Recommending Official, COL Templer served Petitioner a letter dated 22 Mar 91 recommending his downgrade from GM13 to GS11 citing USACARA reports (dated 31 Jan 91 and 11 Feb 91) as justification. These same reports also implicated and condemned COL Templer as a

management official also accused by the same female EEO complainants. COL Templer stated:

"No, Sir" and I'm sorry Sir. No Sir" @ Appendix A, pg 83-84, in response to question that did he know that he was 1 of 4 supervisors (including Petitioner) charged for reprisal by the same complainants as against Petitioner) as summarized by USACARA in their report findings summary at Appendix A, page 85-87. The USACARA report quotes:

> "In any event, the DRM is in a severe state of health."
> "Mr. Hamlin's supervisor and other supervisors knew of this conduct at the time it was being carried out and did nothing about it."
> "Although management officials have articulated job-related reasons for their action, their explanations are not believable. Therefore they are pretext masking reprisal and inattention to the needs of those victimized by the acknowledged sexual harassment."

COL Glosson (the Deciding Official) confessed in 25 Sep 91 hearing extract Appendix A, pg 88-89, that he **had known** that COL Templer was 1 of 4 supervisors accused of reprisal by

sexual harassment complaints. COL Glosson stated:

> "Yes. I recall their names being mentioned that way, yes."

YET COL GLOSSON COMMITTED A HARMFUL ERROR AND PROHIBITED PERSONNEL PRACTICE PER 5 U.S.C. 7701(c)(2) A&B. BY ALLOWING HIS SUBORDINATE, COL TEMPLER, TO SERVE AS PETITIONER'S RECOMMENDING OFFICIAL per 5 U.S.C.Sec 2302(b). COL GLOSSON THEN ACTED IMPROPERLY BY SUSTAINING THE DEMOTION. In MSPB DOCKET DA7529110549, Judge Malouf ERRONEOUSLY IGNORED these laws and ALLOWED Petitioner to be singled out for punishment by COL Templer from all others although COL Templer was equally guilty by him having major and conflicting interests in placing blame elsewhere. Judge Malouf did not consider that Petitioner was not protected from reprisals by the Agency as required by 29 CFR 1613.261 and would not allow Petitioner to question COL Templer about whistleblowing and reprisal instances.

COL Glosson, the Deciding Official (and Petitioner's 3 level supervisor) issued his decision on 10 May 91 lying there was no record of Petitioner's handicap. He also testified on page 90-91, Appendix A:

> "He made great mention about the handicap business. And yet in reviewing his official file there was nothing in his official file, maintained by the Civilian Personnel Directorate,".

Yet later in the same hearing COL Glosson confessed in hearings for MSPB DOCKET DA7529110549 Appendix A, page 20-23 that in early 1988, he had ordered Petitioner to button his collar:

> "I did that in more of jocular fashion because until that time I did not understand that Mr. Hill had some sort of a malady and could not grasp and fasten the tie."
> "My CPO quickly cautioned me later, said You know, we don't have a requirement that you have to wear a coat and tie."
> "He mentioned something that.... said; I have trouble with my hands, and can't fashion the knot and do it properly."
> "Well, he did walk a little different than.... if I can use the word....normal person."

On pg 183-184 continued his lies to cover his own violations by stating:

"I saw no visible evidence that he made any attempt to clean up the work environment. There was just nothing there. In fact, the environment had to be cleaned up by me as a results of the USACARA investigation, to get all the remedies and to get the positions worked out to reassign the people outside of the DRM office."

Judge Malouf mistakenly believed his lies by concluding in her initial decision at pages 185-186, Appendix A that:

"Glosson stated that a serious negative factor was the appellant's attempts to deflect the responsibility for what happened to someone else."

Petitioner's initial appeal for MSPB DOCKET DA7529110549 was sent to the Dallas Regional MSPB 19 Jul 1991. Appendix A, page 92-93, is extract of BLOCK 27 from the initial appeal whereas whistleblowing was cited as affirmative defense. This extract stated:

"Yes, in a very real sense it should be alleged that there was a whistleblowing factor involved in this action against Mr. Hill. He already had a strong reputation as a whistleblower in several other very sensitive matters, and his supervisors were particularly aware of this propensity in Mr. Hill, so that it was their decision to isolate him from, the beginning in

early 1990 and to prevent his participation in any of the EEO complaint informal complaint resolutions (sexual harassment matters) or in any proper function as the division chief when the problems were first being identified, or at anytime afterward while Mr. Hamlin was forced on Mr. Hill on continued assignment in the same division for another 7-10 months after the supervisors became aware of the problem. It was the protective conduct of Mr. Hill's supervisors toward the sexual harasser which was the likely subject for Mr. Hill to focus on and communicate them as whistleblowing, and it was this which his superiors determined to prevent by isolating him and setting him up as a scapegoat for their own misconduct as his supervising managers."

List of whistleblowing and other witnesses, dated 15 Sep 91, requested by Petitioner to Judge Malouf is at Appendix A, pages 94-101. This list enumerated to Judge Malouf reasons each witness was needed.

Petitioner's Hearing Exhibit "A" (Appendix A, pages34-82) for MSPB DOCKET DA7529110549 was forwarded to Judge Malouf on 15 Sep 91 providing detailed long-term and continuous whistleblowing by Petitioner and resulting reprisals by senior officials against him. Applicable laws and regulations (pg 36-38,

Appendix A) provided to Judge Malouf were 5U.S.C. Section 2301(b)(9), 5 U.S.C. Section 2302(b)(8), 5U.S.C. Section 7701.(c)(2), 5 CFR 1201.56(b)(2), and Army Regulation 5-20. Names of key persons, with relationships and background of reprisals against Petitioner, were: Mr. Tommy Joe Mills, Lieutenant General Crosbie Saint, COL Clyde W. Glosson, COL Tommy A. Baucum, COL Thomas W. Templer, Mr. Robert R. Bikoski, Mr. James Hiltz, Mrs. Kathy MacIntyre, and Ms. Cheryl Remick.

By the time Petitioner submitted Hearing Exhibit "A" to Judge Malouf on 15 Sep 91; substantial whistleblowing evidence caused the Petitioner to state on page 35, Appendix A:

> "other retaliatory actions taken against Orlon R. Hill as reprisals for whistleblowing. It is the position of the appellant that the adverse personnel action (demotion) made the subject of this appeal is in fact the principal form of reprisal taken against Appellant for his past continuous acts of whistleblowing."

On 25 Sep 91 and just before commencement of hearing, Judge Malouf issued her Memorandum

of Conference and Rulings (Appendix A, page 51) that disapproved (the most senior individuals) Saint, Baucum, Hiltz, MacIntyre and most of the Petitioner's substantiating whistleblowing witnesses as discussed in documents dated 15 Sep 91 at Appendix A, pages 40-45 and 94-101. COL Baucum and Ms. MacIntyre's affair had been reported to IG by Petitioner only 6 weeks before being letter proposing his downgrade.

During the hearing on 25 Sep 91, hearing extracts at Appendix A, pg 104-105, Judge Malouf erroneously and repeatedly prohibited Petitioner's representative from questioning COL Templer about whistleblowing even though COL Templer was the RECOMMENDING OFFICIAL per 5 U.S.C. Sec 2302 (b) and Petitioner's 2nd level supervisor. Judge Malouf erroneously did not recognize lies by COL Templer during 25 Sep 91 hearing whereas at Appendix A, page 106-107, he gave a late date:

> "I was made aware that he had a handicap and needed some kind of considerations, I guess, in April (91) of this past year."

He lied about knowing Petitioner was handicapped and depressed (and operating in a diminished capacity) prior to subsequent events for which petitioner was charged. Yet COL Templer confessed an earlier date in the same MSPB hearing on 25 Sep 91, extract at Appendix A, page 108, stating:

> "In the July (90) time frame I know that Ms. Frances Mulkey, I guess Sherry Wrbas, Lorena Manning, all were concerned about whether or not Mr. Hill was on some type of medication or something, and maybe that he was off his medication, and that he had been acting differently with his employees."

On page 111, Appendix A, COL Templer also confessed:

> "He (Petitioner) told me that he was on some kind of drug, I guess, in the June or July time frame that he was trying to get off some kind of medicine, if I recall correctly. June or July of '90."

COL Templer therefore knew petitioner was taking medication for depression in May-Jun 90 prior to any supposedly reprisals were performed as charged by the Petitioner.

Judge Malouf erroneously and repeatedly demanded in Hearing extracts at Appendix A,

pg 112-117, that only COL Glosson, (Approving Official and Petitioner's 3rd level supervisor) could be questioned by Petitioner's representative about whistleblowing. She demanded:

> "The person who is responsible.... In order to establish the whistleblowing you must demonstrate that the deciding official, Glosson, knew of the protected disclosure, took action against the appellant, and did so based on the disclosure."

On page 112-114, Appendix A, Judge Malouf also directed:

> "...you have to identify.... The person whose determination is relevant is the deciding official."

Judge Malouf made a major error by denying questioning of COL Templer because he was PETITIONER'S RECOMMENDING OFFICIAL per 5 U.S.C. Sec 2302(b). On Page 116-117, Exhibit A, Judge Malouf again erred by stating:

> "I'm cutting off this testimony."
> "And I'm certainly not going to consider it."
> "He didn't make the decision."

COL Glosson confessed on 25 Sep 91 at the Hearing, Appx A, pg 20-23, that the

petitioner had informed him of being handicapped in early 1988 yet he lied in Appendix A, page 90-91 stating there was no record of Petitioner's handicap.

Judge Malouf at Appendix A, pages 118-127, directed Ms. Manning not to answer questions by Petitioner's representative about her first-hand knowledge about Petitioner's long term whistleblowing nor about senior officials engaged in whistleblowing reprisal against Petitioner as enumerated in Petitioner's Hearing Exhibit "A" dated 15 Sep 91. On pages 118 & 126, Judge Malouf directed:

> "Don't answer that. It's not relevant. Go to another question."
> "Concerning her underlying allegations, not the relation between her and anybody else."
> "And this witness has no personal knowledge of that, because she was not there at the time."

On page 124, Appendix A, Judge Malouf directed the Petitioner's representative as follows:

> "Tell me on the record, right now. Tell me what your allegations about whistleblowing are. And give me the dates."

Mr. Herrmann responded:

> "The whistleblowing dates are specified in Exhibit A,"

Judge Malouf stated on page 125 Appendix A:

> "I don't know.... what hostility you are talking about? Whose hostility?"

On pg 122-123, Appdix A, Ms. Manning testified:

> "A good deal of hostility. People resented Commercial Activities very much." "Well, I would say it went over a period of several years and it was more than one G-3 involved."

In the second case, MSPB DOCKET NO DA-1221-92-0394-W-1, Ms. Manning's affidavit dated 27 Jul 1992 at Appendix A, pages 128-131 was furnished to the full Merit Systems Protection Board on 30 July 92, (for a final decision) to support the fact that whistleblowing was not res Judicata in the second action because her own first-hand whistleblowing testimony was denied in the first action by Judge Malouf for MSPB DOCKET DA7529110549. In the affidavit, Ms. Manning stated:

> "I am making this statement because I was not given the opportunity to discuss these facts during an earlier hearing in Royce

Hill's (Petitioner) case. I was prepared to testify to the type of situations in which CA program management had to operate. I was surprised when the Judge instructed me not to answer questions concerning some of those situations."
"Managers and workers across the installation were deeply resentful of the program."
"Though all of us were targets of this resentment to varying degrees, Royce Hill received the brunt of it. He was single-minded, hard-charging, and very vocal about the program."
"There was also resentment on the part of top management in DRM because CA Program Management had been taken from them and placed in DCCA in 1983."
"Royce was put in a room where supplies were stored.."
"Royce was given no voice in the personnel assignments."
"Another staff activity harboring long-term resentment of the CA program managers, and Royce in particular, was G3/DPTM. This resentment began when we first became involved in applying CA laws and rules to workers in the G3 Range Division." (COL Baucum was Director of this activity)
"Any action in which CA management personnel were involved met with both overt and covert resistance from G3 and DRM managers."
"Several conversations with those persons concerned Royce's deteriorating physical and emotional condition."

Judge Malouf had denied Petitioner his right to present his witnesses and case per Halifan v. U.S., 1965. 354 F2.d, 358, 173.

Within minutes of completing the last day of hearing on 27 Sep 91 for MSPB DOCKET DA7529110549, on Appendix A, page 132, in response to a question about Commercial Activities Program (CA) from Agency's lawyer; Judge Malouf confessed:

> "I can't.... because I haven't read the exhibit, Mr Pobielski. I can't tell you...."

in reference to Appellant's EXHIBIT "A" DATED 15 SEP 91. Yet SHE HAD ALREADY DISAPPROVED WITNESSES AND TESTIMONY IN HER RECORD OF CONFERENCE AND RULING DATE 25 SEP 91 AND DESTROYED THE ABILITY OF PETITIONER TO PRESENT HIS WHISTLEBLOWING CASE.

Judge Malouf issued her initial decision for MSPB DOCKET DA7529110549 on 10 Oct 91 after hearings on 25 and 27 Sep 91. Her incomplete and unsubstantiated findings about the Petitioner's whistleblowing affirmative defense is extract at Appendix A, pages 134-144. Her erroneous conclusion on page 138 stated:

"The contracting disclosures related to

> contracts concerning the firing ranges. According to the appellant, in 1986, in the course of his employment in the agency, he found problems with certain contracts. He claimed that the problem he found and reported, as part of his j between 1986 and 1987, constituted protected disclosures. The record does not establish that the disclosures were protected disclosures, but assuming {arguendo} that those disclosures were protected, I find they were not a contributing factor to the instant action."
> "Accordingly, I find they are too remot in time to be a contributing factor to this action."

On page 139-140, Appendix A, Judge Malo concluded:

> "I find that under the instant circumstances, the appellant's disclosu (IG complaint about COL Baucum) was protected and constituted whistleblowing."

Judge Malouf had massively erred by concluding that long term whistleblowing disclosures by and reprisals against Petitio were not relative because: (1) She had not r Petitioner's Hearing Exhibit "A" (providing names, dates, places, instances, and referen for whistleblowing and reprisals) prior to hearings, (2) She had disapproved COL Baucum

and several other whistleblowing witnesses from appearing, (3) She had stopped whistleblowing testimony by witnesses (especially COL Templer and Ms. Manning) that she did allow to appear.

Judge Malouf acted contrary to the MSPB Board's decision in Clarance B. Gergick vs. General Services Administration, 25 Jul 1991, DOCKET No. SL122190W0030 that the Whistleblower's Law can be used retroactively if a continuous pattern is shown. Extracts of this reference state:

> "A Claim to redress a continuing wrong is deemed to have accrued on the date of the last wrongful act", (Petitioner's demotion).
> "(where a cause for injury is predicated on numerous acts occurring over an extended period, the action accrues with each act, at least until the injury becomes permanent."
> "In the case before the Board, like {Guardians association of New York and Home Insurance Co.}, involves a prohibited employment practice-reprisal-that allegedly continued from before the effective date of the applicable statute until after the statutes's effective date. In addition, we find that the Court's reasoning in the {Home Insurance CO.} is as applicable to the WPA (Whistleblowers Protection Act) as it was to the statute

at issue in this case. That is, a holding that the WPA provides no remedy for a series of retaliatory acts beginning efore its effective date would effectively insulate indefinitely conduct that began before that date, even when new instances of that conduct are initiate after WPA becomes effective. We do not believe this result was intended by Congress when it enacted the legislation"

Petitioner's representative started medical leave from the Texas Bar on 1 Oct 91 (only 4 days after hearing ended) which extended to 1 May 92. He had not performed up to par in representing the Petitioner and had informed Judge Malouf. During Oct 1990, Petitioner had attend 4 weeks of full time Psychiatric treatment with Dr. Paul Hill that had been his Doctor since 1985. At this time, the Petitioner was still recuperating from his major depression as testified by Dr. Hill in testimony extract at Appendix A, pages 145-154 as follows:

"He has very high standards for himself as well as for other people, which means in the real world, he's often very disappointed and upset because other people don't behave accordingly to his high standards."

"Well, yes. The way I would put that is, if it requires extra effort on his part to carry out ordinary activities, most of us wouldn't have to try so hard. Uh, he has been depressed as well. and so he has had less reserve, uh, anyone will - if there's enough stress will begin to dysfunction. But most of us have a fair amount of reserve. That is a very stressful kind of activity to do when you're constantly.... try to do things that the whole organization doesn't want you to do."

In Response to question from attorney about whether the hostile environment forced by his supervisors contributed to Petitioner's problems and necessitate treatment; Dr. Hill responded:

"There is much. We call that a dull bond. If there is no rational way out of that, it in fact, is one of the psychological theories of the causation of schizophrenia. It's an impossible circumstance."
"Uh, He... we... as I understand the time sequences, we did the treatment, the intensive treatment about the time all of this was going on. Right toward the end of it, but at the time it was going on."
"He remained on medicine through the time that he was slipping away, anyway."
"Well, anybody whose job it is to be an inspector and to find people at fault has a very tough row to hoe. Not everyone does that."

At that time, Petitioner did not realize he was still not mentally competent, because of

his major clinical depression, to present is own defense per Frommhagen v U.S., Ct. Cl. 1978, 573, F.2d 52. Although not competent at the time, Petitioner's 8 Nov 91 inadequate appeal was prepared and submitted by him to the Merit Systems Protection Board as required.

Petitioner received 2 letters from the Office of Special Counsel on 15 Jan 92 stating their investigation was completed and recommended that Petitioner should make an Individual Right of Action Appeal (second action) to MSPB DOCKET DA7529110549 about whistleblowing.

Immediately afterward, the MSPB issued the final decision (on first action) on 24 Jan 92 without first receiving and considering the two 15 Jan 92 OSC letters which violates the Merit Systems Protection Board precedent re Kenneth E. Knollenburg v. Merit Systems Protection Board, 9103226, Jan 14, 1992. This reference required that whistleblowing defenses must first be presented to OSC for investigation

before MSPB could decide a case.

The Right of Action Appeal (second action) recommended to petitioner by OSC on 15 Jan 92 was submitted in good faith to the Washington Merit Systems Protection Board on 6 Mar 92. On 18 May 92, at the request of the Agency, Judge Carnes, from Dallas Regional MSPB) issued a show cause to Petitioner on why appeal should not be dismissed due to res Judicata.

Petitioner's 22 May 92 response (provided to Appeals Court) to Judge Carnes' show cause provided minute facts and code citations (the same facts as contained herein) supporting Petitioner's contention that Judge Malouf had made numerous and massive errors which abruptly stopped Petitioner presenting his whistleblowing affirmative defense that resulted in a totally erroneous initial decision by her. JUDGE CARNES STILL RULED res Judicata WITH LITTLE DISCUSSION except for repeats of Judge Malouf's erroneous conclusions.

On 12 Nov 92, the Petition for Review for MSPB DOCKET NO DA-1221-92-0394-W-1, Appendix A, pages 77-91, was forwarded by Petitioner to the Federal Circuit of Appeals for Federal Circuit. All of the above documented salient proofs were enumerated in detail with copies of all document discussed herein **INCLUDING 2 VOLUMES OF THE TOTAL HEARING TESTIMONY FOR MSPB DOCKET DA7529110549. THE PETITIONER HAS** NOT YET HAD HIS CONSTITUTIONAL RIGHT TO PRESENT HIS WHISTLEBLOWING DEFENSE THEREFORE MSPB DOCKET NO DA-1221-92-0394-W-1 SHOULD NOT BE AFFIRMED AS *res Judicata*. There is no indication in the initial decision for the second action by Judge Carnes, the final decision by the Merit Systems Protection Board, and the Federal Court of Appeals had sufficiently studied or considered the proof provided by the Petitioner that Judge Malouf had made major whistleblowing errors in the first action MSPB DOCKET DA7529110549 which deprived Petitioner of his rights to adequately present whistleblowing evidence.

On 19 Apr 93, The Federal Circuit Court of Appeals for the Federal Sector issued the decision for the second action DOCKET NO DA-1221-92-0394-W-1 at Appendix A, pages 1-9, affirming dismissal on the basis of res Judicata. Petitioner contends that based on the above facts, the Federal Circuit Court of Appeals cannot correctly conclude on page 5 of the decision that:

> "However, the decision in the first action is not an issue here."

CONCLUSION

Based on examples herein, Petitioner contends that Judge Malouf did not comply with her authority and responsibility as judge as required by 5 CFR 1201.41 (b)(5)(ii)&(iii) and (10) since she did not review documents to her and properly preside over the hearing. Judge Malouf's errors precluded Petitioner from providing evidence for whistleblowing and other affirmative defenses as required by 5 CFR 1201.56 (b) and 5 CFR 1201.61.

For the reasons set forth above, a writ of certiorari should issue to review the judgement and opinion of the Court of appeals in this matter. Petitioner has been unjustly doomed from the onset of his appeals due to the massive MSPB errors described.

As a minimum, Petitioner requests that the Supreme Court of the United States overturn the ruling of the Federal Circuit Court of Appeals for the Federal Sector by ordering MSPB to accept Petitioner's Individual Right of Action appeal, MSPB DOCKET NO DA-1221-92-0394-W-1, and then legitimately hear Petitioner's whistleblowing appeal.

Due to the massive errors by Judge Malouf in the initial action MSPB DOCKET DA7529110549 and the interrelationship of multiple affirmative defenses, the most optimum and just decision by the Supreme Court of the United States is to order a complete reversal of all previous decisions and make Petitioner whole. If the Court does not reverse; then the Court

should order the MSPB to start over on all affirmative defenses by the Petitioner starting with the initial appeal on 10 Jun 1991 for MSPB DOCKET DA7529110549.

Respectfully submitted,

Orlon R. Hill dated 23 Jul 93

Orlon R. Hill
108 W. Briarwood Lane
Harker Heights, TX 76543
Home, 817-699-2659
work, 817-287-3956

93-158

Supreme Court, U.S.
FILED
JUN 21 1993
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

Orlon R. Hill, PETITIONER

VS.

United States Army, RESPONDENT

PETITION FOR WRIT OF CERTIORARI

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

- APPENDIX A TO
PETITION FOR WRIT OF CERTIORARI

187 PP

OPINION ANNOUNCING
JUDGMENT OF THE COURT

OPINION FILED AND JUDGMENT ENTERED:
April 19, 1993

The attached opinion announcing the judgment of the court in your case was filed today. The judgment was also entered pursuant to Rule 36. The mandate will be issued in due course.

Costs may be recoverable under Rule 39 or as the court may have directed in the opinion. A party entitled to costs is provided with a bill-of-costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs when taxed are payable to the party awarded its costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

FRANCIS X. GINDHART
Clerk

HILL V ARMY, 93-3054
(MSPB - DA1221920394W-1)

NOTE: Pursuant to Fed. Cir. R. 47.8, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

93-3054

ORLON R. HILL,

Petitioner,

V.

DEPARTMENT OF THE ARMY,

Respondent.

DECIDED: April 19, 1993

Before RICH, PLAGER, and LOURIE, Circuit Judges

PER CURIAM.

DECISION

Orlon R. Hill petitions for review of the June 30, 1992 Initial Decision of the Administrative Judge (AJ) , Docket No. DA1221920394-W-1, dismissing his appeal on the ground that it was barred by res judicata. The Initial Decision became the final decision of the Merit Systems Protection Board when the Board denied review on November 5, 1992. We

affirm.

DISCUSSION

In May of 1991, Hill was demoted on the basis of various charges of misconduct including reprisal against EEO complainants, aggravating an offensive work atmosphere, and creating a threatening and hostile work environment. Hill appealed the demotion to the Board (first action). On October 10, 1991, the AJ sustained most of the specifications underlying the charges and concluded that the demotion was proper. The AJ also concluded that the Department of the Army's action was not the result of discrimination based on a handicapping condition and that the Army's action was not the result of reprisal for any whistleblowing activities that Hill might have participated in. Specifically, the AJ determined that the first set of alleged whistleblowing activities, concerning the disclosure of certain contracting information, was too remote in time to have been a contributing factor to the Army's action. As to the second set of alleged whistleblowing

activities, a disclosure to the Inspector General concerning an alleged affair between a military officer and a civilian employee, the AJ concluded that the disclosure was not a contributing factor to the Army's action.

In November of 1991, Hill petitioned the Board for review of the AJ's initial decision in the first action. On January 24, 1992, the Board denied Hill's petition for review. Hill sought review of the Board's decision regarding his claim of discrimination based on handicapping conditions with the Equal Employment Opportunity Commission. The Commission concurred with the Board's findings on August 7, 1992.

Meanwhile, Hill filed a complaint with the Office of Special Counsel (OSC) alleging that he was demoted in reprisal for whistleblowing and on the basis of a handicapping condition. On January 15, 1992, the OSC responded to Hill's complaint, stating that there was insufficient evidence to warrant further action. Hill then sought corrective action before the Board

(second action) by way of an Individual Right of Action (IRA) appeal. On June 30, 1992, the AJ in the second action dismissed Hill's IRA appeal as barred by res judicata. The Board denied Hill's petition for review and Hill petitioned this court for review of the final decision concerning his IRA appeal.

Most of Hill's arguments are directed to the first action. However, Hill did not petition this court for review of the Board's decision in that action and our review here is limited to the second action, and whether the Board properly dismissed Hill's IRA appeal as barred by res judicata. Hill argues that the Board's decision regarding res judicata was erroneous because the AJ in the first action should not have ruled on the whistleblowing issues without accepting all of Hill's evidence and argument on those issues. "However, the decision in the first action is not at issue here." Hill has not shown why res judicata does not bar his attempt to relitigate the determinations on issues that he presented, or

should have presented, in his first appeal concerning his demotion. See Spears v. Merit Sys. Protection Bd., 766 F.2d 520, 523 (Fed. Cir. 1985).

We conclude that the Board's decision is not (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation; or (3) unsupported by substantial evidence. 5 U.S.C. SS 7703(c) (1988). Accordingly, we affirm the Board's dismissal of Hill's appeal.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

INFORMATION SHEET

FILING A PETITION FOR WRIT OF CERTIORARI

Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons. (See Rule 10 of the Rules of the Supreme Court.)

1. The petition must be filed in the Supreme Court of the United States within 90 days of the entry of judgment in this court. The judgment is entered on the day the court issues an opinion in an appeal. If a petition for rehearing is timely filed, the time runs from the date of the denial of that petition. The time does not run from the issuance of the mandate. Issuing the mandate in no way affects the right to petition to the Supreme Court.

2. The docket fee of $300.00, or a motion for leave to proceed in forma pauperis with an affidavit in support thereof, must accompany the petition.

3. The petition must be filed by either a member of the Bar of the Supreme Court or the petitioner pro se.

4. The lower court opinion(s) and any order on rehearing must be included as the appendix to the petition.

5. Forty copies of a petition must be filed. The petition must not exceed 30 printed or 65 typed pages excluding the questions presented page, the subject, index, the table of authorities and the appendix. If the petitioner is proceeding in forma pauperis, one typewritten petition on 8 1/2 by 11 inch paper may be submitted. Supreme Court Rules 33 and 34 govern printing requirements and the form of typewritten papers. Proof of service must accompany the petition.

6. The record of proceedings in this court will be certified and transmitted only upon the request of the Clerk of the Supreme Court.

7. The current Rules of the Supreme Court of the United States, containing

amendments to January 1, 1990, are contained in Title 28, United States Code Annotated.

FOR SPECIFIC INFORMATION WRITE TO:

Clerk
Supreme Court of the United States 1 First Street, N.E.
Washington, DC 20543 Telephone Number: (202) 479-3000

HEADQUARTERS, III CORPS AND FORT HOOD OFFICE OF THE ACofS, 63/PTM FORT HOOD, TEXAS 76544-5056

Memo to DRM (COL Templer written on 2 Feb 90 regarding the subject of DRM "Studies" of G-3 Activities.

Written as follows:

Tom,

Once again, I've been informed that Mr. Hillard and his henchmen are poking around in areas in which:

-they have no expertise

-they have no official charter

- they have not bothered to inform or clear their presence with the individual in charge.

I do not like the way they do business and I do not want them "studying" anything which falls within the purview of G3/DPTM unless they have:

-my personal permission, or

-a written charter signed by the Chief of Staff.

I am tired of trying to cover my backside and the drills which inevitably result from his half-assed studies. I don't have the time required to correct his misinformation.

Signed Tommy A. Baucum
Colonel, GS
ACofS, G3/PTM

Memo to COL Baucum dated February 2, regarding DRM and Range

Re Drm - our conversation this am.

2. Tedd says yea, he knows about DRM's poking nose into targetry and down-range vehicles. He says he discovered, yesterday, that they'd directly contacted Don Miller (Supply Opns), and others, all under the guise of updating their presentation in the continuing CA "umbrella" study of Rge Opns.

3. Tedd says he told em to stay out of his business, etc. (the problem usually stems from a well-meaning but over-zealous Mr. Royce Hill - sort of a self-appointed conscience for range efficiency - a guy we've had to stiff arm before.)

4. I had the impression you were going to talk with Templer about this. I'll do that for you, unless you prefer to do it yourself. (Realize, I also have to talk with Tedd again,

because I think of times he's left the door open by telling the DRM guys something like "if whatever you do will help me get vehicles, I'm all for it.")

5. I don't like DRM poking into things with subordinates at age without checking with me or Tedd - unless it is, in fact, routine data gathering and part of the ongoing CA study.

Signed Robert G. Bernier
Colonel, GS
Deputy, G3 for Training Doctrine, Policy, and Resources.

GOVERNMENT EXECUTIVE

JULY 1991

PAGE 50

Guide to Retaliation

There are many parallels between Leo Bosner's May article, "A Whistleblower's Story," and my own story. The Office of Special Counsel is currently investigating my case. The one area where my case differs from Bosner's is that his agency was stupid from the beginning and left a huge trail of evidence. In my case, management was smart in the beginning and only began to screw up four years into their campaign against me. I have learned how management can cover their tracks. Based on my experience, I offer my "Guide to Management Retaliation Against Whistleblowers:"

- Be very patient. Allow time (years if necessary) between the whistleblowing incident and the beginning of the retaliation, so that it is almost impossible to link the two.

- Wait for, or create, windows of opportunity for retaliation. Make it look like part of

regular management decision-making.

- Never attack on a front where the whistleblower has an acceptable or proven track record. If the employee has always gotten outstanding performance ratings, continue to give them and attack somewhere else. For instance, if the whistleblower has received numerous Nobel Prizes but habitually comes in 15 minutes late, attack there.
- Regular inoculations against scruples are also very helpful.

Roy C. Bartholomae

Bureau of Mines

Pittsburgh, Pa.

enough facts to really do anything with, but they persisted, and at some point.... and I don't recall the precise date .... his wife, who had been employed.... and I believe, worked for Mr. Hill, if I remember correctly.... and then had gotten, I believe, a promotion, or there had been a swap, and she moved to another directorate. And one of the employees there had talked to her because of friendship, and had related some of these allegations to her. She mentioned them to her husband. And he told her, he said, "You know, I really.... you're putting me in an ordered position." My words, not his, because I don't know what precisely he said, but that's the essence of it. He said, "If I learn more I will be duty bound to go tell Col. Templer that he has a problem in his directorate." And obviously at some point that did persist, and he went and told Col. Templer, and that resulted in him telling me, a 15-6, and here we are today.

Q. At what point did he

initiate the informal communication with you that you spoke of?

A. He would.... we had periodic update. He would come up and tell me things that were going on within the directorate, to update me on CPO things. And as I recall, it was in the context of one of these .... it was a close-door session between he and I. And he just mentioned to me, said, "Diana is hearing... " and he said, "I don't know what to do with this yet." He said there's just enough there, you know, not enough substance, apparently. But apparently the conversations continued, and at some point

there was enough there, he informed Col. Templer that he believed that there was some problem and that he needed to be aware of it.

Q. Do you have any idea of the period of time that you would have been receiving such informal discussions from him?

A. I think he told me one time, just mentioned that, you know, "she's hearing this. Because we socialized together, and although his wife was no longer working for me directly.... I believe she went to G-3, if memory serves me correctly, and so she was not directly under my supervision. She worked for Col. Baucum in that capacity. But at some point, obviously, he felt duty bound to go tell Col. Templer.

Q. Well, sir, what you've just stated is in the record, in terms of sworn affidavit or testimony of Diana Hiltz with regard to her actions in the October, November, and January, February time frame. October, November of ....

A. 89.

Q. .... 89.

A. Uh-huh.

Q. And reemerging more strongly in the January and February time frame ....

A. Right.

Q. .... of 90. Do you believe you had some inkling of it from Mr. Hiltz unofficially, informally during that time frame?

A. I don't think it was any earlier than, you know, late February, early March time frame, as I recall. He was not one to

that part of your 1988 policy?

A. It is.

Q. In that form of expression?

A. I think it's verbatim. A quick review looks like it's verbatim to me.

Q. Did....

A. The policy hasn't changed.

Q. Did this intensification or reaffirmation, as you will, drive you to obtain, privately and personally, advance information, and formulate a policy before the official reports were promulgated on the USACARA results?

A. No. I told you that earlier that we had been working for some time on that new EEO standard. I knew that was weak. And we had started that well prior to this investigation being concluded.

Q. Sir, how long have you personally known Mr. Hill?

A. I met Mr. Hill shortly after I took over the position of garrison commander in December 1986. At that time we were heavily

involved in commercial activities, and it was within a month that we were having regular briefings on the commercial activities progress on a variety of events.

Q. Do you recall personally addressing Mr. Hill in the vicinity of Fiddler's Green in early 1988 concerning his open collar and his loose tie and telling him.... ordering him to button his collar and....

A. I did that in more of a jocular fashion because until that time I did not understand that Mr. Hill had some sort of a malady and could not grasp and fasten the tie. " The first time I had seen him basically that way, and I just commented on it. My CPO quickly cautioned me later, said, "You know, we don't have a requirement that you have to wear a coat and tie."

Q. Did he explain to you....

A. And I basically kidded Mr. Hill about that.

Q. Excuse me. Did he explain to you, when that communication took place, that he had an inability to do that with his hands and fingers?

A. He mentioned something that.... said "I have trouble with my hands, and can't fashion the knot and do it properly." And I just let it drop. You know, it didn't have a big .... it wasn't a big deal to me.

Q. Certainly then since that moment you

may have been more personally and directly aware of Mr. Hill's actual physical condition I would suppose.

A. Well, he did walk a little different than.... if I can use the word.... normal person. I describe it loosely as kind of a shuffle. And I notice that he did.... you know, he wore his tie, but he did not have it snugged up like I do. And he's wearing in a similar manner today.

Q. Did you ever observe him in any of his falling down or imbalance episodes?

on that date he assigned Phipps, Jackson and Remick to work with Hamlin; however, he asserted that he did not know the identity of the complainants. The agency alleged that this action on the appellant's part demonstrated his insensitivity to their trauma and his willingness to subject them to more harassment. According to the agency, it was only the intervention of higher management that kept Jackson, Phipps, and Remick from having to face and work closely with Hamlin.

In response, the appellant argued that the agency refused to move Hamlin out of the division during the pendency of the AR 156 investigation and refused to allow the appellant to talk with his subordinate employees about the situation. The appellant's contentions are supported by the record and by the testimony of Colonel Thomas Templer, the Director of Resource Management, and by the testimony of Bikoski. According to the appellant, the division's work still had to be performed and he made an effort

to get assigned projects completed, in spite of the stress caused by the investigation. There is nothing in the record to establish that higher management made any effort to alleviate the tension and problems in the AOERD. The only documentation in the record concerning an adjustment of assignments is a memorandum dated August 23, 1990, from Mulkey to Phipps indicating that she did not have to work on the project with Hamlin. Appeal File, Vol. V. The appellant's undated handwritten notes on the memorandum indicate that Phipps told Mulkey that she did not want to work with Hamlin, Mulkey discussed it with the appellant, and he allowed the change. No higher management was involved in the reassignment.

Given Hamlin's continued presence in the division, it would have been impossible for the appellant to have completely shielded Jackson, Phipps, and Remick from Hamlin.) They worked in the same area and on many of the same projects. It is undisputed that the appellant had

requested higher management to move Hamlin out of the division; yet, Hamlin remained from the time the investigation began in May 1990 until it was concluded on September 4, 1990. The agency did not submit any testimony

Royce Hill, because of his inability to be mobile and move about his division area at the normal and expected level of a manager?

A. Sir, I .... No, sir. I was not aware that .... I knew that Lorena Manning was a branch chief for him. But I was ....you know, I'm not aware that she acted as his eyes and ears, or did Ms. Mulkey. No, sir.

Q. Then I take it if we had testimony in this proceeding from such women that that indeed the case, it would be news to you?

A. Yes, sir.

Q. Is it your testimony that it was your decision to freeze Mr. Hamlin in the efficiency review division?

A. Yes. I feel fully responsible for the decision of freezing there. I ....

JUDGE MALOUF: That's all. Just answer the question. Move on.

Q. [BY MR. HERRMANN:] Sir, the Agency has submitted a regulation which I find

in their initial response, and I wonder if you are familiar with it, and if you have been familiar with it. That's 29CFR section 1604.11, and specifically subparagraph (c). The submission is found attached to the Agency response at paragraph.... excuse me. At tab, I believe it's 4(b).

MR. HERRMANN: May I approach the witness, Your Honor?

JUDGE MALOUF: Yes.

Q. [BY MR. HERRMANN:] Are you, and have you been

The record reflects that the agency's action was taken in compliance with the procedural requirements set out in 5 U.S.C. SS 7513. The appellant was given notice of the proposed action, an opportunity to reply, and his reply was considered by the deciding official, Glosson, prior to making the final decision. The appellant did not demonstrate that any due process violations occurred.

The appellant argued that Templer, the proposing official, had made a prejudgment of the case before issuing the proposal. In this appeal, Templer proposed the demotion action based on various charges. It was up to the deciding official, Glosson, to, determine whether those charges were supported by the evidence (and to determine the appropriate penalty. Glosson alone had the discretion to make the decision and he unequivocally testified that he made the decision to demote the appellant. There is nothing in the record to refute Glosson's testimony. *See Hayes v.*

United States Postal Service, 42 M.S.P.R. 651, 657 (1989). The appellant has not demonstrated that any error occurred on this basis.

The appellant did not cite any law or regulation that required the agency to remove Hamlin from the workplace prior to .conclusion of the AR 15-6 investigation. Nor has he cited any law or regulation that required the agency to give him mid-term guidance or counseling on reprisal; and the creation or aggravation of a hostile work atmosphere. Thus, the appellant failed to demonstrate that any error occurred.

Contrary to the appellant's assertions on appeal, the agency did furnish information about the procedure for the EEO investigations and informed him that he could be represented by counsel. See the appellant's response, Appeal File, Vol. V. , letters dated November 2, 1990, and November 15, 1990. The appellant has not demonstrated that any error occurred.

The appellant has not demonstrated by preponderant evidence that any procedural error

occurred; thus his affirmative defense on this basis fails.

INSPECTOR GENERAL ACTION REQUEST

Form is filled out as follows by:

Hill, Orlon R. (GM-13), 447-38-4682

287-7450 - Work Phone

DRM Fort Hood, Texas - Office

108 W. Briarwood Lane, Harker Heights, TX

Action requested: Check facts to determine if sighting is of any significance. If so, inform command, if not, forget it. I do not desire any feedback.

Information pertaining to request:

In late Dec 90/early Jan 91, as I was approaching the Texaco Station on 195 in Killeen, I was passed by Kathy McIntyre G-4 and then COL Baucum in their separate vehicles. Time was around 0630. Their passing and speed caught my attention especially. Also, I had heard unsubstantiated rumors about them. As I arrived at my destination (Donut shop), they proceeded South and both turned into Manufacturer's parking lot. I proceeded south to Jasper, then east seeing the two vehicles adjacent on north edge of parking. There were no other vehicles in the parking area. I did

not approach the vehicles nor see the two individuals in their parked vehicles.

E-7 Peters

Please do not disclose my name.

Signed on 12 Feb 91

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

DALLAS REGIONAL OFFICE

ORLON R. HILL,	)	DOCKET NUMBER
Appellant,	)	DA07529110549
V.	)	
DEPARTMENT OF THE ARMY,	)	DATE:September 15,1991
Agency.	)	

VERIFIED MEMORANDUM ON REPRISALS TAKEN AGAINST ORLON R. HILL FOR WHISTLEBLOWING

A SUBMISSION BY APPELLANT UNDER OATH AS EXHIBIT "A"

This submission under oath is filed by Appellant prior to prehearing conference for the purpose of presenting to the Board, and to the office of Special Counsel, in a fully articulated, verified, documented, organized and evidentiary manner, the Appellant's affirmative defense of prohibited conduct consisting of the

adverse personnel action made the subject of this appeal and other retaliatory actions taken against Orlon R. Hill as reprisals for whistleblowing. It is the position of Appellant that the adverse personnel action made the subject of this appeal is in fact the principal form of reprisal taken against Appellant for his past acts and continuing acts of whistleblowing, and that the allegations made against Appellant by the Agency as grounds for the adverse personnel action are wholly without merit and were maliciously contrived as a smoke screen and as an elaborate excuse for baseless vituperation and unlawful reprisal against this Appellant. The MSPB and the OSC are respectfully requested to consider the following:

1. Verification:

The attached Affidavit in Verification of Memorandum on whistleblowing as signed under oath by Orlon R. Hill, is incorporated herein by reference, as though here set forth verbatim, for purposes of affirming the truth and correctness of all of the facts and allegations contained herein.

2. Applicable Laws and Regulations:

2.1. At 5 U.S.C- 5 2301(b)(9) -- Merit System Principles -- it is specifically enacted as follows:

(b) Federal personnel management should be implemented consistent with the following principles: ... (9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences -- (A) a violation of any law, rule, or regulation, or (B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety....

2.2. At 5 U.S.C. SS 2302(b)(8) -- Prohibited Personnel Practices has been specifically enacted as follows:

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority -- ...(8) take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for -- (A) a disclosure of information by an employee

or applicant which the employee or applicant reasonably believes evidences -- (i) a violation of any law, rule, or regulation, or (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or ...

2.3. At 5 U.S.C. SS 7701(c)(2) [also at 5 CFR SS 1201.56(b)(2)) -- Appeals to MSPB --it has been enacted as follows:

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment -- ...(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or ...

2.4. See entire AR 5-20 (Commercial Activities Program) for regulation requirements which imposed duties and function on Mr. Hill

which frequently and unavoidably involved some whistleblowing disclosure activities.

3. Whistleblowing as Part of Appellant's Work:

Appellant was employed by the Agency as a Supervisory Management Analyst, which position which put him in charge of the Commercial Activities Program at Fort Hood,-Texas, from August of 1984 until October 29, 1990, which program he personally administered pursuant to AR 5-20. His function and duties in that line of work required him to conduct management studies into all manner of installation operations. At **EXHIBIT "B"** see true copies of pertinent portions of AR 5-20 (Commercial Activities Program), of the DA Form 374 (Job Description for Appellant), and of DA Form 5397-R (Civilian Performance Plan for Appellant's job). These documents make it clear that Appellant was essentially tasked as the installation Commercial Activities Program Manager, and that his duties included extensive evaluation of the management, resources and manner of operation of installation/garrison

activities, most of which were being studied for purposes of reorganization as competitive "Most Efficient Organization" (MEO's) or for conversion to more cost effective commercial contracting. The required Management Study criteria are listed in **EXHIBIT "B"** at Figure 4-3 of the October 1986 Supplement to AR 5-20; they are extensive and necessitated very probing inquiries into and disclosures about current management and mismanagement, grossly unacceptable wasting of funds and assets, and abuses of authority, by virtue of the required assessments of operation procedures, technology utilized, workload data, personnel analysis, materials analysis, facility analysis, mission analysis, organization analysis, and responsibility analysis. As a result of this sensitive tasking of the Appellant, his function as an Army efficiency expert was frequently opposed with extreme hostility and he was mistakenly regarded as a dangerous enemy who functioned as a crusading and self-actuating ombudsman. This job required Mr. Hill to participate in and conduct protected disclosure

activity on a routine basis, which thoroughly antagonized and incensed all manner of key and superior military and civilian personnel and commanders. Further, this Appellant is by nature a highly principled person who has always been completely predisposed to absolute scrupulousness, and he has voluntarily engaged in some other protected disclosure activity which has also caused or contributed to the complained of reprisals taken against him. The Appellant's job-related protected disclosure activity **and** his volunteered protected disclosure activity are **both** addressed herein.

4. Key Persons, Relationships and Background: The key persons who were involved in and affected by the whistleblowing activities of the Appellant are as follows:

4.1. Mr. Tommy Joe Mills -- has been the civilian Aide to the Secretary of the Army for the Fifth U.S. Army Region during all pertinent times in this memorandum; in private life he is a diversified businessman with extensive interests and holdings and has frequently sought service type contracts with the U.S. Army

throughout the region; he has been very close to LTG Crosbie Saint, in social, civic and professional circles; and this influential person was rebuffed and highly offended by the refusal of Orlon R. Hill to facilitate successful bidding for service contract activities at Fort Hood with specifically requested preferential treatment for Tommy Joe Mills and his enterprises.

4.2. LTG (Lieutenant General, three stars) Crosbie Saint -- was the Commanding General of III Corps and Fort Hood, Texas, from early 1986 through the summer of 1988; this commander was officially and personally affected and offended by disclosures from the Supervisory Management Analyst Orlon R. Hill; and this general officer has been and still is very close to Ms. Cheryl Remick (see below), one of the EEO complainants employed in Mr. Hill's division and affecting this Appellant.

4.3. COL Clyde W. Glosson -- was the Garrison Commander at Fort Hood from December of 1986 through May of 1991, a position directly under the Commanding-General which placed him in

charge of the physical installation and of all the civilian personnel at Fort Hood; and he had the final decisionmaking authority in several reprisal actions affecting Appellant in that period of time.

4.4. COL Tommy A. Baucum -- from early 1989 through May of 1991 he was the Assistant Chief of Staff for G-3, and was in charge of all tactical operations planning, all military training and all military mobilization for Headquarters III Corps and Fort Hood, which meant he was also in charge of all Fort Hood firing ranges and military training sites and field area facilities, and as such he had tremendous influence and control over a major part of the supporting civilian structure which was under the Garrison Commander at Fort Hood; from June of 1991 to present he has been the Garrison Commander for Fort Hood; and it should be specially noted that he is a 1963 graduate of Texas A & M University and its Corps of ROTC Cadets, and that he was an upper division cadet superior to the next key person listed, COL Thomas W. Templer, for the two years that person

spent as a plebe and lower division cadet at Texas A & M University.

4.5. COL Thomas W. Templer -- from July of 1988 to the present he has been the Director of DRM (Directorate of Resource Management); his immediate superior is the Garrison Commander; he and his Deputy Director were the immediate superiors of Appellant; he is in charge of allocating all installation operating funds and civilian manpower spaces and civilian payroll for all of Fort Hood, his responsibilities include corporate installation management and organization, and of those responsibilities the Commercial Activities Program and the Army Community of Excellence Program were the most extensive and sensitive because they encompassed evaluations of management effectiveness and management efficiency for the whole of Fort Hood under Army regulations- such as AR 5-20 (Commercial Activities Program); and it should be specially noted that he is a 1965 graduate of Texas A & M University and its Corps of ROTC Cadets, and that while he was a plebe and lower division cadet he was subordinate to the

previously listed key person, COL Tommy A. Baucum, who was his superior as an upper division cadet for those two years.

4.6. Mr. Robert R. Bikoski (GM 14) -- from January of 1988 to the present he has been the Deputy Director of the Directorate of Resource Management for Fort Hood and he was the immediate supervisor of the Appellant.

4.7. Mr. James E. Hiltz (GM 14) -- from September of 1984 until April of 1991 he was the Civilian Personnel Officer for Fort Hood; he and his wife, Diana Hiltz, who was Mr. Hill's employee until the end of January of 1990, both had substantial prior knowledge of the Hamlin sexual harassment problems and informally notified COL & Mrs. Templer long before any action was taken.

4.8. Mr. Orlon R. Hill (GM 13 reduced to GS 11) -- From April of 1974 through July of 1984 Mr. Hill served as the Supervisory General Engineer GM 13 (registered to practice in Texas and Oklahoma and qualified for GM 14 in five separate disciplines) in the position of Chief, Engineering Plans and Services Division,

Directorate of Engineering and Housing, Fort Hood, Texas; from August of 1984 through April of 1987 Mr. Hill served as Program Analyst Officer GM 13 in the position of Chief, Commercial Activities Division, Directorate of Contracting and Commercial Activities, Fort Hood, Texas; from May of 1987 through October 27, 1990, Mr. Hill served as the Supervisory Management Analyst GM 13 in the position of Chief, Army Organizational Efficiency Review Division, Directorate of Resource Management, Fort Hood, Texas; from October 28, 1990, through May 18, 1991, Mr. Hill was summarily detailed as a Non-supervisory Management Analyst GS 12 with duties as assigned (none given, but did a few minor clerical tasks, and ended up having to assist my replacement: acting division chief in learning her job), an assistant to the Deputy Director, Directorate of Resource Management, Fort Hood, Texas; from May 19, 1991, to present Mr. Hill has been demoted and has been serving as Non-supervisory Program Analyst GS 11 with duties as assigned to assist the Deputy Director, Directorate of Engineering and

Housing, Fort Hood, Texas; and the obvious reprisal nature of these last two career moves will be detailed below.

4.9. Mrs. Kathy MacIntyre (GS 11) -- from June of 1988 to June/July of 1990, she was a Management Analyst in the Manpower Authorization Documentation Division of the Directorate of Resources and Management and served as the Manpower Coordinator between DRM and G-3; and she exploited her position and her relationship with COL Baucum, the C-3, to the detriment of the Commercial Activities Program.

4.10. Ms. Cheryl Remick (GS 7) -- from September of 1984 until May of 1991 she was a Management Assistant in Mr. Hill's division; she is one of the EEO complainants affecting the Appellant in this case; she is a very close friend of General Saint, whose horses she has taken care of for years; and she was a ready and direct source of instant feedback to the Commanding General and the Garrison Commander on any and all sensitive matters.

5. Specific Whistleblowing Activities by Appellant:

5.1. February 12, 1991 -- Mr. Orlon R. Hill made full disclosure of a clandestine rendezvous he had recently observed between COL Tommy A. Baucum and Mrs. Kathy MacIntyre, two married federal employees in responsible senior positions, although Mrs. MacIntyre was subordinate. **EXHIBIT "C"** in this appeal is the written record of initiated Inspector General complaint activity by Mr. Orlon R. Hill. He reasonably believed at the time that this was evidence of unlawful conduct which in the case of the colonel probably constituted one or more offenses under the Uniform Code of Military Justice: as conduct unbecoming an officer, as prohibited fraternization, and as adultery; and he further believed that it was evidence that either or both parties were involved in legally prohibited activity as sexual harassment, or as sexual discrimination for or against the other federal employee. Although the exact date of the clandestine rendezvous is not available, the timing of the incident is absolutely clear in the mind of Orlon R. Hill, because he recalls that it

happened at the very last stage of Operation Desert Shield, while most people at Fort Hood had been on extended working hours and were not taking their normal time off for the traditional holidays, and just before the bombs were dropped on Iraq on January 15, 1991, in Operation Desert Storm. In the dark on that day, Orlon R. Hill was driving to work from Harker Heights and took the Texas 195 (old FM 440) exit to go to Jack & Jill Donuts about two blocks south of U. S. 190 on Texas 195 in Killeen. On the Westbound U.S. Hwy 190 exit ramp he noted that the car ahead of him was a Saab automobile being driven by Mrs. Kathy MacIntyre whose face was clearly seen as he stopped beside her at the red light in the adjacent lane. Both vehicles turned left or south under the expressway and immediately a third vehicle pulled in right behind the MacIntyre vehicle in very light traffic. That third vehicle was also in the adjacent lane beside Mr. Hill's vehicle so that he saw the driver's face and uniform and recognized COL Tommy A. Baucum as the driver. There were no other occupants in those vehicles, and neither

river looked at or recognized Mr. Hill. It was bout 6:30 A.M. In a state of shock Mr. Hill nitially started to pull into Jack & Jill onuts while he continued to observe and note hat the other two vehicles were sharply ccelerating and proceeded closely together oing past Mr. Hill to the south, signalled, raked and turned together to the east on Taylor lvd. which is the back entrance through an ndeveloped area going into Manufacturers Outlet enter located at 1035 Jasper in Killeen, Texas a distance of 2.6 miles from COL Baucum's uarters in Patton Park on Fort Hood, and the pposite direction from his place of work). nable to believe what he was seeing, Mr. Hill mmediately proceeded south after them and -passed the Taylor Blvd. rear entrance and eaded off and around on Jasper in front of the nufacturers Outlet Center where he had a clear ew across the immense parking area because of ie absence of any other vehicles and the esence of adequate lighting from the store ont. In the extreme northwest corner of that rking area he clearly saw and identified those

same two vehicles parked directly adjacent to one another, with COL Baucum's vehicle on the left or west side and with both vehicles facing north into the undeveloped field, which was a shadowy location about 200 feet back from the frontage on Jasper and also 200 feet west and away from the store front illumination. It was less than two minutes of elapsed time between seeing them turn left on Taylor and reobtaining visual contact on Jasper, but both of their vehicles were already parked and had already doused their headlights and taillights and no brake lights were visible, nor was anyone visible outside the two vehicles, and Mr. Hill could not see anyone sitting up in the vehicles. From Mr. Hill's vantage point he could clearly see that there was no other vehicle attempting to exit that vacant retail parking area in either direction. Then Mr. Hill proceeded slowly past the Manufacturer's Outlet Center and on down Jasper to the east. Half a mile later at Citizens National Bank Mr. Hill turned around on Jasper and drove back slowly by Manufacturers Outlet Center and observed that nothing had

changed during the intervening three minutes, so he turned north on Texas 195 and went into the donut shop and had coffee and a donut seated facing 195 for 10 or 15 minutes, and while there he did not see either of the vehicles return up 195 to go to Fort Hood. It was clear to Mr. Hill at that time that COL Baucum and Mrs. MacIntyre were having a tryst and conducting an extra-marital affair right there in the retail parking area which was posted "No Trespassing" after hours. Mr. Hill then drove into Fort Hood alone and went to work. During the next several days Mr. Hill closely observed that COL Baucum and Mrs. MacIntyre were frequently together in the corridors of the Headquarters, and while using separate vehicles were nonetheless arriving at work together, leaving for lunch together, and leaving work together with extended socializing in the parking lot; Mr. Hill also took note of the fact that numerous other people were aware of this activity and were openly concerned; and yet Mr. Hill had not disclosed this rendezvous incident to anyone other than his own wife through February 11,

1991. But on February 12, 1991, a little over a month after the observed rendezvous, Mr. Hill was still pondering how to go about disclosing the incident, when he then first learned that COL Baucum had just been officially designated the week before to succeed COL Glosson as Garrison Commander, and that fact immediately caused Mr. Hill a great deal of concern with the realization that COL Baucum had demonstrated such a lack of moral character that he would be entirely the wrong type of person to be placed in charge of the entire EEO program at Fort Hood. Mr. Hill went straight in to see his Director, COL Templer, and out of a sense of loyalty first orally reported the incident to COL Templer for purposes of obtaining his concurrence that it must be reported to IG. In view of COL Templer's prior assertions to Mr. Hill made during other times of personal conflict between Hill and Baucum, to the effect that he, COL Templer, and COL Baucum were fellow Aggies (Texas A & M University graduates) and knew each other in the Corps and had supposedly been drinking buddies, it had been firmly

impressed on Mr. Hill by COL Templer that COL Baucum was always a difficult and unreasonable person to deal with, but nonetheless COL Templer claimed to have a way to handle him and COL Templer could help guide Mr. Hill now in this situation. COL Templer on February 12, 1991, told Mr. Hill that "You have to do what you have to do, so you have no choice but to go to the IG." Mr. Hill then promptly went to the IG office the same day and provided the statement to Sergeant First Class Peters of the Fort Hood IG office and requested Inspector General action, as appears on the true copy of the submitted DA Form 1559 at **EXHIBIT "C"** in the record of this appeal. At that time SFC Peters appeared to want Mr. Hill to leave the matter in IG hands without the need for any report or response to Mr. Hill, and he agreed to that, but he specifically asked the IG to investigate and determine the facts and if significant to inform the higher commander. (Mr. Hill knows that it was no coincidence that just three days later on February 15, 1991, the out-going Garrison Commander "ordered" COL Templer to pick up all

of Mr. Hill's personal files and records which pertained in any way to the three individuals who had filed EEO complaints against John Hamlin for sexual harassment and against management for obstruction, and they began to develop the major reprisal activity against Mr. Hill, because COL Baucum had tried in the past to get COL Templer to take punitive action against Mr. Hill for conducting management studies and making supposedly unwarranted probes into and disclosures about G-3 activities -- see Section 5 below, "Reprisals Against Orlon R. Hill".) Ever since he witnessed that clandestine rendezvous, Mr. Hill has observed and noted that COL Baucum continues to flaunt his on-going affair with Mrs. MacIntyre in front of the entire work force and frequently goes on TDY trips with her, while both of them are still married to and residing with their own spouses. Mr. Hill believes it was no coincidence either, that Mrs. MacIntyre obtained a promotion and reassignment from Corps G-4 into G-3 right after COL Baucum left G-3 and took command of garrison in June of 1991. The rest of **EXHIBIT "C"**

consists of true copies of records showing the renewed and continuing IG complaint activity by Mr. Hill at Department of the Army Inspector General level.

5.2. January 23 & 25, 1991 -- There was open criticism by Mr. Hill of the EEO program as being mismanaged at Fort Hood, Texas, under the Garrison Commander. It was communicated verbally by Mr. Hill at an EEO meeting of all GM 13's and above, which meeting was called by the Garrison Commander on January 23, 1991, and again more specifically and in writing on January 25, 1991 (see **EXHIBIT "D"**).

5.3. Late March/Early April, 1990 -- Following the report on the management survey or "climate study" of DRM personnel completed in August of 1989, COL Templer expressed concern about the morale and effectiveness of DRM personnel in general and directed that all rumors about DRM employees be reported to him personally by Mr. Bikoski and by the several Division Chiefs in DRM. That directive caused Mr. Hill in the last week of March or the first week of April in 1990 to report personally to

COL Templer that many people seemed to be aware of the rife and disturbing rumor that Mrs. Kathy MacIntyre was having a flagrant extra-marital affair with COL Tommy A. Baucum, both of whom were married to and residing with their own spouses. Mrs. Kathy MacIntyre was then a DRM employee in the position of Management Analyst GS 11, in the Manpower Authorization Documentation Division of DRM, with assigned duties as the direct Manpower Coordinator with G-3, and with COL Baucum personally. COL Templer replied only that he had heard about that and the subject was closed with that statement. Since sexual misconduct was the subject of the rumor Mr. Hill was then reporting, it would have been a proper time for COL Templer to have mentioned to the uninformed Mr. Hill the prior receipt by COL Templer of "unofficial" information from his own wife and Jim Hiltz about Mr. Hamlin's sexual harassment activities in Mr. Hill's AOER Division; but at that time COL Templer was still bowling with Mr. Hamlin; and the work relationship between Mr. Hill and COL Templer had already been severely

strained by COL Baucum's attempted reprisal on Mr. Hill the year before (see Section 6.3 below).

5.4. October 13, 1988 -- See **EXHIBIT "E"** Although LTG Crosbie Saint had just vacated his position as Commanding General of III Corps and Fort Hood, his loyal senior officer subordinates were still in place when Mr. Hill made embarrassing disclosures of two separate illegal procurement activities by that general officer which consisted of the following: (a) the Kodak Company had been solicited personally by General Saint to research and develop "smart tank gunnery targets" which would provide electronic sensing of the caliber, number and placement of hits on the target, with Kodak having been encouraged to expect to receive a substantial order for the finished product from General Saint and Fort Hood, which was a violation of federal acquisition regulations respecting conflict of interest avoidance and procurement authorization procedures and requirements; and (b) a large shipment of night-illumination devices called "chemlites" had been personally

ordered by General Saint without a purchase order or fund citation, and without authorization for procurement from a single source without bidding, again in violation of federal acquisition regulations. Mr. Hill verbally communicated this to his Director, COL Templer, and extensively within his own division, including Ms. Cheryl Remick, a close personal friend of General Saint who periodically returned to the area. These problem actions could only have been resolved and corrected afterward with the collaborative efforts of COL Bernier (Deputy G-3), COL Fiero (the G-3) (shortly succeeded by COL Baucum), COL Templer (DRM to provide the funds), LTC Proctor (Director of Contracting), COL Clyde W. Glosson (Garrison commander), and Mike Finn (command contract legal advisor), so that Mr. Hill's personal and divisional prior participation in surfacing and disclosing such matters was very noticed.

5.5. The October 1986 Range Fiasco -- A brand new generation of firing ranges was needed for the changing warfare doctrine and technology

with tanks and armored vehicles shooting on the move now, and the old Korea-vintage range facilities were obsolete, as was the military organizational method of operating them. The new targets and range facilities were becoming highly technological and required specialists to operate them. Temporary civilian personnel were provisionally hired until the new mission matured and was ready for civilian contract operation. In early October of 1986 the Deputy Commanding General of III Corps and Fort Hood, Major General Brown, sent a team of Mr. Hill, Mr. Hamlin and Mr. Mike Finn, Command Contract Legal Advisor, which team was headed by Mr. Hill, to FORSCOM in Atlanta to prepare the way for preliminary authority to go directly to contract on the ranges without first having to perform a lengthy Commercial Activities management study and Most Efficient Organization plan. That would have been possible, except for the fact that unknown to MG Brown and Mr. Hill eight full-time permanent civilians had been mixed in with the temporary civilians and put on range operations by the G-3, directly against

command guidelines to keep it entirely manned with temporary civilian personnel, and this fact of permanent personnel involvement activated a mandatory provision of federal law (Section 501 of the annual appropriations act) which then unavoidably required a full Commercial Activities study and removed all discretion to do otherwise. The moment that Mr. Hill and MG Brown learned of this fact, the Fort Hood team at FORSCOM was recalled and Mr. Hill personally briefed the Commanding General of Fort Hood, Lieutenant General Crosbie Saint, on this development and the fact that it would now require a one-to-two-year delay to complete the exhaustive studies and begin contracting range operations. General Saint was livid, and even though it was his own G-3 operations people who had messed this up, he blamed the Commercial Activities Program bureaucrats and Mr. Hill for Fort Hood's inability to proceed at once. This posturing by General Saint was fueled by his own Staff Judge Advocate (COL Thomas M. Crean) and G-3 (COL Fiero assisted by LTC Tommy Franks, and followed by COL Baucum assisted by COL Bernier,

with Mr. Tedd Welch as the permanent civilian range officer) and the Director (COL Frosty Roberts, followed by COL Templer) of the Directorate of Management and Resources, all of whom eventually recruited to their position the incoming Garrison Commander, COL Clyde W. Glosson. General Saint and those key personnel still tried to oppose and circumvent this unavoidable legal contracting requirement by sending a new team back to the FORSCOM Commander with a renewed request for authority to go directly to contract. The new team consisted of COL Crean, COL Roberts, LTC Franks and Mr. Hill; the team leader was COL Crean, and the advance man to go early to FORSCOM and study the position of the headquarters staff was Mr. Hill. The rest of the team was to join Mr. Hill in Atlanta at Mr. Hill's hotel the night before on October 20, 1986, and they failed to show that night and barely made the appointment with the FORSCOM Commander the next morning, so that Mr. Hill's study and prebriefing never reached them. COL Crean, the spokesman, and the others went into the meeting unprepared and in an impaired

condition from the excesses of their previous night on the town, and they failed miserably so that General Palastra stopped the briefing in mid-stream and summarily ordered that he would not allow them to make a presentation to Department of the Army and they were ordered to go back to Fort Hood and make the proper Commercial Activities study. All of these facts were fully and truly disclosed and reported by Mr. Hill to his division personnel, to Major General Brown and to COL Don Clay, Mr. Hill's@ Director, as the disgraceful outcome of an improper attempt to circumvent the legal requirements and to compensate for mismanagement at the Corps headquarters. [NOTE: This state of affairs still exists and the range fiasco still rankles throughout the headquarters at Fort Hood; the Commercial Activities Program has been steadily attacked and impeded by the headquarters and is virtually dead; and the range study has yet to be completed.]

5.6. April/May of 1986 -- Mr. Hill received a direct call from the Civilian Aide to the Secretary of the Army for the Fifth Army

region, Mr. Tommy Joe Mills, requesting that Mr. Hill change the specifications for the letting of the bids on the clothes washer and dryer contract for the troop billets and bachelor officer quarters all over Fort Hood, specifically requesting a change in the specifications for the purpose of favoring Mr. Mills and improving the likelihood his making a successful bid for the contract. This was clearly an unlawful solicitation and Mr. Hill immediately rebuffed Mr. Mills and refused to consider the request. Mr. Hill then also immediately informed all of the personnel within his Commercial Activities Division, the contracting officers in the Contracting Division of DCCA, and the Director and Deputy Director of DCCA, about the fact of the call and of his rejection of the unlawful procurement proposal.

5.7. See Section 3 above for detailed description of continuing nature of actual and perceived whistleblowing which flowed directly from the nature of Mr. Hill's official work and duties from 1984 through 1990.

. Specific Reprisals Against Orlon R. Hill:

6.1. May 10, 1991 -- Under all the circumstances of past and continuing whistleblowing by Mr. Hill, as set forth in detail in Sections 3 through 5 above, the final decision to impose the adverse personnel action which is the subject of this appeal was made on this date, reducing Appellant from Supervisory Management Analyst GM 13, serving as Chief of Army Organizational Efficiency Review Division, to Non-supervisory Program Analyst GS 11, serving in the Directorate of Engineering and Housing, was as a whole or in large part an unlawful and intentional reprisal against Mr. Hill for his past lawful disclosures of information which he reasonably believed evidenced violations of law or regulation, or mismanagement, a gross waste of funds, or an abuse of authority. This reprisal was designed and carried out by COL Thomas W. Templer, by COL Tommy A. Baucum, and/or by COL Clyde W. Glosson.

6.2. October 28, 1990 -- For over six and one-half months, and starting before completion of any of the EEO complaint investigations (not even convened until mid-November) involving Mr.

Hamlin's sexual harassment activities, the Agency took specific punitive action against Mr. Hill, by summarily and without due process or due administration suspending him as Chief of the AOERD and moving him into an exposed three-sided cubicle which was open to a major corridor and against the directorate condiments and collating areas. The Agency also summarily detailed him to an inferior non-supervisory management analyst GS-12 position without any work or meaningful duties, without telling him until January of this status which attached to his summary reassignment. Although his pay and benefits were unaffected, this reprisal action was nonetheless a humiliating and prohibited personnel practice which is defined as a significant change in duties and responsibilities which were inconsistent with Mr. Hill's salary and grade level. This reprisal was designed and carried out by COL Thomas W. Templer, by COL Tommy A. Baucum, and/or by COL Clyde W. Glosson.

6.3. February 2, 1989 -- See **EXHIBIT** for specific documentation of the attempted reprisal

against Mr. Hill by COL Tommy A. Baucum for past and continuing waste and mismanagement on the firing ranges at Fort Hood and under COL Baucum'"s management, which disclosures were a necessary and on-going part of Mr. Hill's job as Supervisory Management Analyst in charge of the Commercial Activities Program management studies and Most Efficient Organization proposals required under Executive Order, Congressional mandate and DOD directives.

6.4. March of 1988 -- A further reprisal was taken against Mr. Hill as division chief, and against his AOER Division, by COL Frosty Roberts, Director of DRM, by William D. Bradley, Deputy Director of DRM, and by Don Armstrong, Assistant to the Deputy Director, by then humiliating Mr. Hill and placing him in a very small part of a supply room or warehouse filled with storage items and supplies in the front of Building 126 under everyone's scrutiny and without his secretary or any other members of his division who were all satellited out in other buildings; and this condition continued for eight months as intended reprisal and

humiliation which was immediately obvious and apparent to most people at the time. It was very personal.

6.5. May 10, 1987 -- As a direct result of the "range fiasco" (see Section 5.5 above) and the continuing efforts of senior management personnel at Fort Hood to shut down the CA Division (AOER Division) or to slow down its embarrassing mismanagement disclosure activities by putting it firmly under other leadership and control, a major reprisal was taken against Mr. Hill, as division chief, and against his Commercial Activities Division or re-designated AOER Division, by all of the persons identified in Section 5.5 above. This reprisal reorganization process actually began in November of 1986 after those senior persons involved in the "range fiasco", through a personal luncheon invitation to Mr. Hill extended by Lieutenant Colonel Tommy Franks (now a Brigadier General), then Assistant G-3 at III Corps and personal friend and protege of Lieutenant General Crosbie Saint who was Corps Commander at the time. It was to have been

two-party luncheon to discuss the initiation of the Commercial-Activities study directed on October 21, 1986, by the Commander of FORSCOM, GEN Palastra (four stars), at the end of the unsuccessful "range fiasco" presentation made to that higher commander. The unsuspecting Mr. Hill came under direct attack by all of the senior personnel from the "range fiasco" who surprised him by being in attendance and waiting for him at the supposed two-party luncheon. The specific persons in attendance were: COL Thomas M. Crean, SJA (who had personally made the disastrous presentation to General Palastra), COL Frosty Roberts, DRM, Mr. Tedd Welch, GM 13 Range Officer, Lieutenant Colonel Tommy Franks, and Mike Finn, Command Contract Legal Advisor. Their demand was that Mr. Hill "volunteer" to assume total control of all facets of the Commercial Activities management studies for all the firing ranges and Fort Hood, which they knew he could not agree to do because it was contrary to the program procedures established by the Commanding General at the time, and because he would not have the necessary additional manpower

and resources of the Management Division of DRM where data compilation was handled for the Commercial Activities Program studies, and the only alternative which these gentlemen allowed Mr. Hill was to "volunteer" transfer his entire CA Division (or AOER Division) from Directorate of Contracting and Commercial Activities over to Directorate of Resources and Management. It was an ultimatum. This elite circle of Fort Hood leaders was determined to put the lid on Mr. Hill and his division, because of his embarrassing disclosure activities (about mismanagement at Fort Hood), and because of their own agenda. By May 10, 1987, they were able to manipulate and implement exactly this reorganization plot against Mr. Hill and his division, chiefly because of the intervening retirements and replacements of two key Colonels: COL Don Clay, the Director of DCCA, and COL Mick Lanham, the out-going Garrison Commander who was being replaced by COL Clyde W. Glosson. In the process of this reprisal reorganization they effectively and intentionally discredited and humiliated the

division by providing no place to move into, no coordination and logistical support for the move, and no normal social courtesies or hail and farewell for the departing and arriving division and personnel. Mr. Hill and his personnel had to move their office furniture and equipment mostly in their private vehicles and entirely with their personal labor. When DRM did give them a new home, they found themselves fragmented and split up into multiple locations in three or four buildings, unlike any other DRM division, and unlike their prior facilities and working accommodations. It was intended to slow down the progress of the division, and it had that effect.

6.6. July of 1986 -- Mr. Hill and his division's Commercial Activities Program management study and Most Efficient Organization plan for Directorate of Engineering and Housing were subjected to attempted reprisal for alleged breaches of confidentiality, which false charge was levied by the competing Directorate of Resource Management (which eventually in 1987 did absorb the entire Commercial Activities

Division and re-designated it Army Organizational Efficiency Review Division) and by the III Corps Staff Judge Advocate, because the management study and MEO for DEH involved the possibility of unlawful disclosures of sensitive management and procurement information or leaks of same to civilian contractors before the opening of bids. See EXHIBIT "G". This was in reality just another attempt to shut down the CA Division (AOER Division) or to slow down its embarrassing mismanagement disclosure activities by putting it firmly under other leadership and control. The parent Director, DCCA at the time, responded cooperatively and reassuringly to the SJA and nothing more developed, until that 1987 reorganization reprisal against Mr. Hill and his division and the resulting fragmentation and initial reduction of the CA Division (or AOER Division) cited above in Section 6.5.

7. Other: Evidence of Reprisal Nature of Decision of May 10, 1991:

7.1. See **EXHIBIT** "H", at Appellant's request for production number 21, and see **EXHIBIT** "I",

at the Agency response to request for production number

21. This is further evidence of the reprisal nature of the adverse personnel action decision of May 10, 1991. Although the EEO complaints by Marilyn Jackson, Marilyn Phipps, and Cheryl Remick, as filed herein with the investigation record and report, contained allegations of reprisal by four named persons in DRM management (COL Templer, Mr. Bikoski, Mr. Hill, and Mrs. Mulkey), the Agency has targeted and taken adverse action against only one of those four persons -- Mr. Hill, who is the only one of the four who had no knowledge of when the EEO complaints were filed or of who had filed any EEO complaints, and who had no control of the situation imposed on him and AOERD by his superiors during delayed and protracted investigation with enforced continued presence and activity by the sexual harasser which directly caused an extremely hostile work environment for the complainants and the whole AOER Division.

7.2. Although the formal written findings

in the investigation reports filed of record in this case from the AR 15-6 investigation of Mr. Hamlin and from the consolidated EEO complaints by Marilyn Jackson, Marilyn Phipps, and Cheryl Remick made no specific findings of any specific reprisals by Mr. Hill or by any other individual in management, the Agency once again targeted only Mr. Hill for adverse personnel action based on its own and arbitrary selection of specific reprisal allegations against Mr. Hill. In fact the AR 15-6 report and record makes no findings of any reprisals by anyone (see previously submitted record), and the report and record of the consolidated EEO complaint makes only a general finding that there were reprisals (unspecified) by a collection of management officials which included Mr. Hill. (See also that previously' submitted record.) And it is immediately apparent from the submitted investigation record of the Linda Clay EEO complaint, that both the investigator and the Agency have unlawfully and grossly over-extended the EEO precomplaint period for purposes of constructing a reprisal allegation against Mr.

Hill and have totally ignored the exceptionally poor work ethic of that complainant and her long history of such chronic behavior and her past disciplinary record for insubordinate behavior, coupled with the reasonableness of management's efforts to obtain productivity from this employee as a matter of necessary, continuing and appropriate disciplinary measures which began the moment she arrived in the division and continued without regard to the Hamlin sexual harassment matters, in which Linda Clay was not involved as a victim.

8. Conclusions:

8.1. Under these circumstances, it is an unavoidable conclusion that these allegations by the Agency against Mr. Hill stemming from intense communication situations and disciplinary actions and matters conducted by Mr. Hill within AOERD were not really believed by higher level management as intended reprisals by Mr. Hill against whistleblowers in sexual harassment claims, nor were the delays in Hamlin's removal which were enforced by Mr. Hill's superiors and were beyond Hill's control

truly believed to be attributable to Mr. Hill as actions of condonation of sexual harassment or obstruction of sexual discrimination complaints, nor was there any real belief by his superiors that Mr. Hill must have known for a substantial prior period of time about the on-going sexual harassment activities of Hamlin before they officially came to light (absent any direct evidence of prior knowledge or of anyone's having told him of such matters, and especially in light of his long established reputation for making direct and embarrassing disclosures in both his official capacity in conducting management studies and in his personal capacity as a principled person). Had Mr. Hill's superiors really believed a substantial number of these 28 allegations which were so recklessly lodged against Mr. Hill, a mere two-grade reduction to GS 11 would have been totally inadequate,and complete removal from civil service and all federal employment would have been essential. There were two or three reasons why Mr. Hill's superiors did not do so: (A) his superiors did not themselves really believe

these things of Mr. Hill, and (B) his superiors were using the pretense of required disciplinary action against Hill for their own purposes, which were as follows:

(1) As pure scapegoating in order to protect Mr. Hill's superiors against any disciplinary action possibly to be taken against them for their own failures in not taking timely action about Mr. Hamlin's sexual harassment activities: (a) because of their substantial prior knowledge (long before Mr. Hill had any knowledge) and their apparent condonation and protection of Mr. Hamlin in his unlawful sexual harassment and discrimination activities, (b) because of their totally unwarranted delay of the AR 15-6 investigative proceedings for the increasingly apparent purpose of knowingly obstructing the victims' rights to due process and full and timely redress, and (c) because of their extreme vulnerability to demands for disciplinary action against management for directly causing a very hostile work environment for all of the months that they prolonged the investigation and knowingly froze Mr. Hamlin all the while within

the same work environment and within the same working relationships and extended and perpetuated his sexual harassment activity and intensified the frustrations and conflicts within that work environment; and

(2) For their own agenda which was the calculated discrediting, humiliation, demotion, and removal of Hill from any managerial positions and ratings, because of his past and continuing actions in making such embarrassing disclosures, whether officially required or personally motivated, of the activities of his superiors which he believed were unlawful or improper.

8.2. Because of his critical position as Chief of Army Organizational Efficiency Review Division at Fort Hood and his many sensitive duties as the Supervisory Management Analyst in charge of administering and conducting the Commercial Activities Program, Mr. Hill was at the time of the adverse personnel action made the subject of this appeal a person who had been officially functioning as a federal employee specifically tasked to conduct and direct

critical management studies with probing investigative evaluations and revealing disclosures, which work necessarily and frequently included the process of making or causing critical disclosures which were of such a nature as to make such disclosures a legally protected activity within the meaning of 5 U.S.C. SS 2301(b)(9), and therefore the taking of such adverse personnel action against Mr. Hill in a manner which included to any extent a purpose of reprisal against him for making or causing such disclosures was a prohibited personnel practice within the meaning of 5 U.S.C. SS 2302(b)(8).

8.3. Appellant has shown the reprisal nature of the appealed adverse personnel action and the protected nature of these whistleblowing disclosure activities, which Mr. Hill conducted either as part of his official duties or as personally motivated requests for corrective action, . It then follows that it is essential that Mr. Hill and all persons with duties and positions of a similarly critical and sensitive nature be zealously protected and insulated

against unlawful and arbitrary adverse personnel actions such as the one here made the subject of appeal, especially where there is even the faintest taint of reprisal or attempted reprisal against a person making lawful and protected disclosure!i such as Mr. Hill has routinely had to make during the course and scope of his position of employment in a long and distinguished career in federal service at management level, which management career would effectively be prematurely ended by such action. In fact the law provides the appropriate remedy of an affirmative defense under 5 U.S.C. SS 7701(c)(2)(B) and under 5 CFR S 1201.56(b), which law requires that the Agency's action not be sustained under these circumstances, because the showing by Appellant is irrefutable that the decision in the adverse personnel action was based in whole or in part on one or more prohibited personnel practices, and therefore the Agency's action must not be sustained by the Board in this case, even if the Agency were to meet its burden of proof of unacceptable performance supported by substantial evidence

[under 5 U.S.C. S 7701(c)(1)(A)], which it cannot possibly do with the record in this case.

Respectfully submitted,

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

ORLON R. HILL, Appellant, V. DEPARTMENT OF THE ARMY, Agency.	DOCKET NUMBER DA07529110549 DATE: September 15, 1991

AFFIDAVIT IN VERIFICATION OF MEMORANDUM ON WHISTLEBLOWING

STATE OF TEXAS)

COUNTY OF BELL)

Before me, the undersigned authority, on this day personally appeared ORLON ROYCE HILL, who proved to me by satisfactory evidence to be said person, and who stated under oath and deposed as follows:

"My name is ORLON ROYCE HILL. I have personal knowledge of the facts and matters asserted in this affidavit and all are true and correct. I am over 18 years of age. I have never been adjudged mentally incompetent nor been convicted of a felony or any offense involving moral turpitude. I am not disqualified by law from making this affidavit.

"I am the named Appellant in the foregoing document entitled Verified Memorandum on Reprisals Taken Against Orlon R. Hill for Whistleblowing. I have personal knowledge of the facts and matters stated therein, except where stated to be based upon reliable information and reasonable belief, and they are true and correct, or true and correct to the best of my information and belief."

ORLON ROYCE HILL,
Affiant

SWORN TO AND SUBSCRIBED before me by the said ORLON ROYCE HILL on this the 15 day of September, 1991, to certify which witness my hand and seal of office.

signed:
Name: Judy E. Herrmann
(Seal) Notary Public in and for State of Texas
My commission expire : 7/18/92

Q. But there have not been any formal or record adverse personnel action proposals taken against any of those people?

A. No, sir. I've reviewed all the case[s] and laid all .... the full situation, and I made the determination or recommendation on what should be done.

Q. And for the record then, the other persons that were named as .... complained about or responding management type officials were Francis Mulkey, Mr. Bikoski, and yourself. Is that correct?

A. I don't recall that Ms. Mulkey was a responding management official.

Q. She was a name subject of part of the complaint, the consolidated complaint, was she not?

A. Sir, I think there were two responding management officials, Mr. Bikoski and Mr. Hill, for the consolidated complaint. And there was one, Mr. Hill, for the complaint on Ms. Clay, sir. If I recall correctly.

Q. You do not recall that you, yourself, were named as the set of complaint in that set of complaints?

A. No, sir.

Q. You do not recall that Ms. Mulkey was named?

A. I'm sorry, sir. No, sir.

Q. You recall only that Mr. Bikoski and Mr. Hill were named, is that correct?

A. Sir, I'm not sure I understand your terminology.

19. In any event, the DRM is in a severe state of health. All who testified, whether partisan or neutral, describe a condition in which employees have given up trust in their superiors and lost motivation to perform at their best. Removing John Hamlin will not improve that situation, and it will not rejuvenate patronage under regulations on sexual harassment. Moreover, it is unlikely that the atmosphere will be improved by redrawing organizational lines. Leadership is needed. Rehabilitating the environment will require dedication on the part of the complainants, their coworkers, and their supervisors. Otherwise some specific corrective actions personal to the complainants are clearly in order.

FINDINGS OF FACT

20. John Hamlin told sexually explicit jokes, created and circulated lewd material, and made unwelcome body contact with the complainants.

Mr. Hamlin's supervisor, Orlon R. Hill, and other supervisors knew of this conduct at the time it was being carried out and did nothing about it.

21. Each of the complainants was treated less favorably after they started their individual complaints.

RESOLUTION

22. The record supports a prima facie case of reprisal and of sexual harassment. Although management officials have articulated job-related reasons for their actions, their explanations are not believable. Therefore they are pretext masking reprisal and inattention to the needs of those victimized by the acknowledged sexual harassment.

23. Evidence demonstrates that the complainants suffered physical and emotional decline because of the hostile environment created by the sexual harassment and by the unlawful reprisal. The preponderance of evidence indicates that had it not been for their complaints, they would have been treated more favorably.

RECOMMENDATIONS

24. Beginning immediately, the complainants must be permitted to hold positions which fully preserve their present status that are outside the supervision and duty location of John R. Hamlin and Orlon R. Hill.

04-90-232-E

Q. Well, in fact, that paragraph makes it clear that in that instance there is no excuse, no avoidance of absolute responsibility of the Agency or the employer because of lack of knowledge or lack of reason to know, or because of any directives prohibiting such conduct that were in effect.

A. Yes. A very positive and affirmative statement.

Q. In that instance the is a total command or employer responsibility.

A. Yes.

Q. Are you aware that the EEO complaints filed by the three ladies named four management officials as having conducted reprisals against them?

A. Yes.

Q. And that those four individuals named were Mr. Royce Hill, Mrs. Francis Mulkey, Mr. Robert Bikoski, and Col. Templer?

A. I recall their names being mentioned that way, yes. Can we get that blind adjusted?

JUDGE MALOUF: This one here?

THE WITNESS: Yes.

JUDGE MALOUF: Is that in your face? Can you get it....

THE WITNESS: Excuse me.

[PAUSE]

THE WITNESS: That's good. Thank you.

JUDGE MALOUF: Thank you.

assuming they were facts. He put them on paper. I accepted them as factual, not knowing otherwise. But they did not relate to this particular issue of the reprisal and the environment for which he was directly responsible - And so I just basically excluded them because that did not have bearing.

Q. If I may call your attention, sir, to page 1 of your letter. You identify, in paragraph 3, in a rather detailed discussion, your consideration of what you have termed extraneous matters.

A. He made great mention about the handicap business. And yet in reviewing his official file there was nothing in his official file, maintained by the Civilian Personnel Directorate, that would give me any official notice that he was a handicapped employee, period.

Q. Had you been given any notice by, for example, Col. Templer, that Mr. Hill considered himself to be a disabled employee, and therefore had requested some particular accommodation?

A. None to my knowledge.

Q. Had Mr. Hill, in your normal dealings with him, from time to time when you may have had just normal command dealings with him, ever indicated to you in any way that he was needing or requiring, or would appreciate some particular accommodation?

A. None.

Q. Have you had to look into other cases where the

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Supplement to MSPB Form 283, on 19 Jul 91

Continuation Page Three

BLOCK 27. Yes, in a very real sense it should be alleged that there was a whistleblowing factor involved in this action against Mr. Hill. He already had a strong reputation at work as a whistleblower in several other very sensitive matters, and his supervisors were particularly aware of this propensity in Mr. Hill, so that it was their decision to isolate him beginning in early 1990 and to prevent his participation in any of the EEO complaint informal settlement resolutions (sexual harassment matters) or in any proper function as the division chief when the problems were first being identified, or at any time afterward while Mr. Hamlin was forced on Mr. Hill on continued assignment in the same division for another 7 - 10 months after the supervisors became aware of the problem. It was the protective conduct of Mr. Hill's supervisors

toward the sexual harasser which was the likely subject for Mr. Hill to focus on and communicate to others as whistleblowing, and it was this which his superiors determined to prevent by isolating him and setting him up as a scapegoat for their own misconduct as his supervising managers.

BLOCK 28a. (No change.)

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

DALLAS REGIONAL OFFICE

ORLON R. HILL,	DOCKET NUMBER
Appellant,	DA07529110549
V.	
DEPARTMENT OF THE ARMY,	DATE:September 15,1991
Agency.	

APPELLANT'S LIST OF WITNESSES

The attached pages of listed witnesses names are submitted prior to pre-hearing conference for the consideration of the Board as witnesses to be called by Appellant at the hearing of this case. A concise summary of principal areas of expected testimony is also listed for each witness. At the end is a certificate of service.

Respectfully submitted,

William G. Herrman, TBN 09543500
Attorney for Appellant
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WITNESSES

Name/Area

Armstrong, Don

Knows more of people involved than anyone else

Knows everything about DRM and policies

Bohannon's late interview

Grudge against Hill

Barr, Denny

Reasons provided on why he did not provide handicap office

Accommodations when T was sat in hallway

Social relationships with Bikoski and Templer and Armstrong

His discussions with MacIntyre and Wallace

Harassments in his own work area.

Batman, Gail

He was present at Mulkey incident whereby I "made" her cry.

He was present when I was supposed to have

chewed out Clay.

Berry, Ellen

She gave damaging testimony and I want to face her

She was harassed by Hamlin and not reported to me.

She said I called her "Ellen Girl"

She said I chewed her out in Mar 90 about ACOE.

Baucum, Tommy, Col

His reprisal of me in Feb 90 note, information gained from MacIntyre.

My reporting him to IG and related questions

If he sets a good EEO example to workforce to be involved in my MSPB settlement.

Bikoski, Robert

Responding Management Official on everything contained in Appeal and my reduction in grade

Bohannon, Joan

EEO counselor that prepared fraudulent report
Instructions she got from Glosson or Captain

Butler, James

Can speak to my reputation, capabilities, morals, handicap for period since 1976.

Captain, Myrtle

Instructions she received from Glosson, Templer, Thad
Instructions she gave Bohannon
Information she gave others that filed EEOs against me
Info she gave 15-6 Investigating officer, Dutcher
Info she gave USACARA investigators on cases she hung me
Why the EEO program does not follow AR 690-600 by allowing supervisors to be involved.
Why she did not respond to my 16 Nov 90 letter for explanation of my rights and responsibilities as RMO.

Clay, Lynda

I want to face my accuser with questions of where I was charge with reprisal

Crean, Tom Col

Drunk in Atlanta on 20 Oct 86 before range brief to FORSCOM CG

His role in taking reprisal against me as a whistleblower

Dimmer, Tom

Was never interviewed by Bohannon but was listed as such in her report.

Former employee of DRM receiving reprisal and knowing of mine.

He visited me two three times in hallway DRM and saw the situation

Douma, Mary

Supervisor of Ms. Berry that did not inform me of harassment.

She was present when I allegedly chewed Berry in Mar 90

She also received reprisal from 1987-90.

Dutcher, Mike

Was AR 15-6 investigating officer that delayed for 5 Months.

His findings and report to Glosson or Templer or Captain about me.

Instructions he was given

Franks, Tommy, MG

Getting drunk at FORSCOM on 20 Oct 86

His role in reprisal against me.

Glosson, Clyde Col Ret

His reprisal against me as RMO

My whole case

Harris, Valorie

She overheard conversations while I was chief AOERD

She complained about domino playing by Hamlin at my desk.

She may have provided infor about AOERD and me directly to Biloski

Hiltz, Dianna

She broke harassment to Templer's wife in Jan 90.

She testified that I did not know about harassment.

Her husband Jim Hiltz was CPO that knew about harassment for months and supposedly did not tell anyone

Hiltz, Jim

CPO that told Templer and whoever else

What did he tell to who and when and why did he not tell me.

How did he collaborate with Glosson, Templer, Captain, Dutcher?

Kelly, Patrick

Testified against me

I took action to control him by coming to work and being late but he did not claim reprisal

Jackson, Marilyn

One of EEO claimants against me

Clear up facts,

Why reprisal against me and not Templer,

Bikoski, Mulkey

Visits with Glosson and Captain

Knotts, Addie

Black GM 13 Div Chief that was interviewed late by Bohannon

She thought I was being punished by being set in Hall.

She can testify to Clays behavior and record

She knows DRM policies and is dissatisfied with EEO Program

She previously filed and won EEO with state . and won

She was there when Glosson embarrassed me at Jan 91 mtn

Her rating was changed at same time as mine on 15 Aug by Glosson but her's has statement removed that "she's a credit to her sex and race"

I did not approve Don Armstrong, Colonel Tommy Baucum, Colonel Tom Crean, Mike Dutcher, MG. Tommy Franks, Valerie Harris, Diana Hiltz, Jim Hiltz Kathy McIntyre, Gen. Saint, Thad Podbielski, Lucy Scrivner, Mary Seger, Eloise Soliz, and Michele Wallace as witnesses for the appellant because their testimony would not be relevant to the determination to be made in this appeal. The appellant deleted Joan Bohannon, Mrytle Captain, Tom Dimmer, Patrick Kelly, Ron Lawson, Susan Marterella, Colonel Frosty Roberts, Tedd Welsh, Harry Wilson, Investigator Bargainer, and Investigator Pebbles as requested witnesses. I informed the parties that at the hearing, the parties may renew their motions for the named witnesses if circumstances warrant.

6. HEARING EXHIBITS - Hearing exhibits must be introduced at the hearing, and at that time I will specifically rule on their admissibility.

7. BURDEN OF PROOF - I discussed the burden of proof and advised the parties that the agency has the burden of proof by a preponderance of the evidence on the merits of the appeal and

that the appellant has the burden of proof by a preponderance of the evidence on his affirmative defense.

8. OTHER MATTERS - The hearing set for September 25, 1991, in the Magistrate Courtroom at Fort Hood, Texas, at 9:00 a.m.

If either party disagrees with this summary, a written objection or motion to supplement this memorandum must be filed immediately.

FOR THE BOARD

Marie A. Malouf

Administrative Judge

Honor.

JUDGE MALOUF: Stop. Again, stop. I want you to realize that the affirmative defense on whistle-blowing has to relate to the deciding official, and not this witness. Continue.

Q. [BY MR. HERRMANN:] Did the.... Well, you've already testified the range study predated your arrival here, right?

A. I think it did, sir. we were briefing shortly after I got here on some revised milestones and things, and I recall that happening.

Q. Let me ask you, Col. Templer, is it true that in January or early February of 1990 you knew that Col. Baucom was coming on board as the new garrison commander, designated?

A. There was a good possibility, let's put it that way. I don't think that I definitely knew of anything like that, but there was a good possibility that he would be coming on board. He was attending a course

that most garrison commanders attend, so most everybody realized that he was going to that course, so you know, that possibility does exist when you attend the course.

It's an Army installation of management....

JUDGE MALOUF: Stop. Excuse me.

THE WITNESS: Yes, ma'am I'm....

JUDGE MALOUF: If you will just respond to his questions.

THE WITNESS: Yes. There was....

Q. Col. Templer, my name is Bill Herrmann- I believe we've met at least once before. Is that correct?

A. That is correct, sir.

Q. And you understand that I am Mr. Royce Hill's representative?

A. I understand that, sir.

Q. The area of my inquiry will go beyond the scope of Mr. Podbielski's inquiry; you understand that?

A. Yes, sir.

Q. Let me ask you, first of all, sir, about your knowledge of Mr. Hill's personal handicapping conditions or limitations if any. Have you been aware of any conditions affecting Mr. Hill personally?

A. I was made aware that he had a handicap and needed some kind of considerations, I guess, in April of this past year. Ms. Bohanan [phonetic], I believe her name is, from EEO came by my office and indicated that Mr. Hill was seeking some kind of concessions. And this was in April. I I'm

not sure what they were, other than the fact that we had mistreated him, I believe, by giving him a smaller space than other division chiefs. And I can't remember specifically.... there were three, I believe.

Q. Col. Templer, you said you came to Ft. Hood in, what, approximately July of 188?

A. Yes, sir. That is correct, sir.

Q. And assumed duties, in that time frame, also as

A. I think I had a open door policy that wasn't published. People came if they had a problem on a study or anything else; they came to my office.

Q. Had individuals actually exercised that right? I mean, had they visited you on occasion with questions, concerns?

A. In the July time frame I know that Ms. Francis Mulkey, I guess Sherry Hill, Lorena Manning, all were concerned about whether or not Mr. Hill was on some type of medication or something, and maybe that he was off of his medication, and that he had been acting differently with his employees.

Q. What type of concern was expressed?

A. That he had.... his behavior was less than, perhaps, professional. By that, I mean sharp with his employees.

Q. Okay. Did you have opportunity to talk to Mr. Hill concerning the perception that was out there?

A. I think I mentioned it. I had talked to Royce about his medicine at one time. I

think it was the June, July time frame, about the same time frame.

(PAUSE]

Q. When you finally reviewed all of the information that you've already identified, did you consult with anyone in the command chain above you.... what, perhaps you might refer to as the command group.... your course of action?

A. No, sir I did not. Do you mean for my recommendation?

Q. Yes, sir. Prior to issuing this notice of proposed

Q. Have you noted the manner in which Mr. Hill must physically handle papers?

A. I had not noticed anything until he mentioned the paper clips.

Q. Even at those conferences with those handouts where materials brought in by the conferees, you didn't notice the strange way in which he handles papers and materials?

A. No. Now that you mention it, I hadn't paid any attention; had not noticed.

Q. I'll ask you more specifically. Do you recall his inability to use digital grasping of any such objects as papers and handouts?

A. And I say again, not until he asked specifically that he have stick-ons as opposed to paper clips did I notice .... or did he indicate to me that he had a problem, or did I notice anything?

Q. Col. Templer, when did you first become aware of the fact that Mr. Hill was a continuing.... a patient under treatment for clinical depression?

A. He told me that he was on some type of drug, I guess, in the June or July time frame, that he was trying to get off of some kind of medicine, if I recall correctly. June or July of 90.

Q. Is it your testimony that you have no prior knowledge of this condition?

JUDGE MALOUF: Stop. Don't answer anything else. Let him ask another question.

Q. [BY MR. HERRMANN:] At the point, in January or February, of early February of 90, that that awareness or knowledge existed concerning Col. Baucom's probable succession as garrison commander he was serving in what office at that time?

A. G-3.

JUDGE MALOUF: What's the relevance of this testimony?

MR. HERRMANN: Your Honor ....

JUDGE MALOUF: You don't have to stand up. Just give me the relevance, please.

MR. HERRMANN: We're showing relationship and part of the picture of the alleged reprisal for whistle-blowing, which ultimately will be the GC's action.

JUDGE MALOUF: The person who is responsible.... In order to establish the whistle-blowing you must demonstrate that the deciding official, Glosson, knew of the protected disclosure, took action against the

appellant, and did so based on the disclosure.

MR. HERRMANN: Yes.

JUDGE MALOUF: Baucom is a subordinate to Glosson, and we had this discussion in a prehearing conference.

MR. HERRMANN: Correct me if I'm wrong, Your Honor, but as in civil or criminal law cases, legal inferences do result from the totality of circumstantial evidence, do they not?

don't know how much.... That's what I'm going to consider; is who made the decision. And he can talk to every.... he can talk to every single person on the base about it, and they all can give him input. But as he's testified under oath, repeatedly, that he made his own decision.

MR. HERRMANN: Your Honor, I will agree at this moment that he has responded sufficiently in that area, probably. However, the issue is a valid one, I believe, worth probing with some other witnesses as the case unfolds, because of the fact that we have asserted harmful procedural error in the nature of predetermination, prejudgment, and essentially command....

JUDGE MALOUF: But the person ....

MR. HERRMANN:.... influence involvement.

JUDGE MALOUF:.... you have to identify .... The person whose determination is relevant is the deciding official.

MR. HERRMANN: Yes. In terms of predetermination and prejudgment.

JUDGE MALOUF: In terms of the action, period. Otherwise, you're going to have to show me a regulation that shows that there is a certain way that it has to come down, and that it didn't come down that way. And that the fact that it didn't come down that way so grossly prejudices the appellant that the action would not have been taken in the absence of that error.

Q. [BY MR. HERRMANN:] Let me ask you, Col. Templer, when

determined to propose that action against Mr. Hill, did either the civilian personnel officer, Mr. Jim Hiltz, the garrison commander, Col. Clyde W. Glosson, or the labor counselor, Thad Podbielski, suggest to you that you do so?

A. Neither Clyde Glosson, neither Jim Hiltz, neither Thad Podbielski indicated to me that I had to take any action.

Q. And in the alternative, sir, did Myrtle Captain make such a suggestion to you?

A. And as an alternative, neither did Myrtle Captain.

Q. And are you absolutely positive of these statements by you?

A. Nobody said I had to take any specific action.

Q. Let me ask you, sir, is there a point in time when you first determined that you might want to propose such an action against Mr. Hill?

JUDGE MALOUF: I'm cutting off this

testimony I don't care about the proposal. Even if somebody in personnel had call@ed him up and said,, "You need to do something about that." There's no .... unless you can show me a reg. that would prohibit that, there's no impropriety in that. I don't know where you're going. It seems to me you're trying to make a point where there is none. And I'm certainly not going to consider it. This gentleman, except for the fact that you all represented to me that he had personal knowledge of the facts that went on, would not be sitting here at all. He didn't make the decision. I

A. No

Q. Would you believe that of Mr. Hill?

A. No.

[PAUSE]

Q. To your recollection, were there ever any difficulties in managing the employees or obtaining work production from such persons as Cheryl Remick or Marilyn Jackson or Marilyn Phipps?

A. Uh, Marilyn Jackson I did not supervise. The other two I did. And yes, they occasionally had some productivity and motivation problems.

[PAUSE]

Q. To your knowledge was there a relationship between Cheryl Remick and Lt. Gen. Crosby Saint?

JUDGE MALOUF: Don't answer that. It's not relevant. Go on to another question.

[PAUSE]

Q. Was there a linkage between the coordination of Commercial Activities studies and the manpower phase that would have been

communicated to G-3, through the coordinator, Kathy MacIntyre?

JUDGE MALOUF: What's the relevance?

MR. HERRMANN: I'm sorry?

JUDGE MALOUF: What relevance does that have to my determination?

MR. HERRMANN: Well, Judge, it has been alleged that we

MR. HERRMANN: There were .... although the testimony is not in yet, there were disclosures of unlawful procurement violations that were committed by General Saint under his personal direction or arrangement. And which was alleged....

MR. PODBIELSKI: Judge, that is pure allegation.

JUDGE MALOUF: Stop. Stop.

[OFF THE RECORD]

[ON THE RECORD]

What relevance does it have to my determination?

MR. HERRMANN: They were just ....

JUDGE MALOUF: Are you essentially....

MR. HERRMANN: Let me illustrate.

JUDGE MALOUF: Let me understand what your argument is. Because Mr. Hill was doing his job in reviewing contracts and making disclosures that are required by his position three years ago that somehow the agency waited three or four years and then took this action against him purely based on those disclosures?

MR. HERRMANN: The connection is not that remote. if I may explain.

JUDGE MALOUF: I have asked you repeatedly to explain it and it keeps being remote. Alright. And I'm not going to allow information that is irrelevant. It has to be tied to this action.

MR. HERRMANN: Let me remove the remoteness. Such disclosures were made in the presence of Cheryl Remick.

A. Yes. Several months.

Q. And during all of your experience in Commercial Activities, did you note any hostility or difficulty in working with the activities or units being studied or being proposed for being a most efficient organization plan?

A. A good deal of hostility. People resented Commercial Activities very much.

Q. Was that a stressful type of employment activity for a person to be involved in?

A. Yes, yes. It was. The fact that people took their frustrations with the program out of those of us who were trying to manage the program, did at times become very stressful.

Q. Were you aware of any particular problems involving the, Corps G-3 and the firing ranges?

A. Yes.

Q. Was that a major continuing or unresolved conflict or controversy?

A. Well, I would say it went over a

period of several years and it was more that one G-3 involved.

Q. Do you have an opinion, frankly, concerning the uh, reputation or character of Mr. Hill as a law abiding citizen? Does he have a reputation that you know of?

A. Uh, yes. I've never heard anything to the contrary and had no reason to believe anything else.

Q. Does he have a good or bad reputation in the community

have some whistle-blowing and we have some alleged reprisal and ...,

JUDGE MALOUF: Tell me on the record, right now. Tell me what your allegations concerning whistle-blowing are. And give me the dates.

MR. HERRMANN: The whistle-blowing dates are as specific in the Exhibit A, which has not been proffered but is in physical evidence here. The dates of Ms. McEntyre's involvement in bringing information at a preliminary and unresolved stage would have ben during the whole time that she was the Manpower Coordinator with G-3.

JUDGE MALOUF: I'm sorry, Mr. Herrmann I do not understand the relevance of the question to my determination.

MR. HERRMANN: Well, it certainly has a bearing on the degree of hostility and conflict and the continuing....

JUDGE MALOUF: I understand that that's your assertion, but I am asking you what is

the relevance. I don't know.... what hostility are you talking about? Whose hostility? Number one, is General Saint on this post right now?

MR. HERRMANN: No, he is not.

JUDGE MALOUF: Alright. Has he ben on this post anytime as a commander in the last three years?

MR. HERRMANN: He left in 88.

JUDGE MALOUF: So, what relevance does General Saint have to this action?

MR. HERRMANN: In terms of .... well, this witness is available now. Ms. Remick may or not ever be called. But the allegations in her testimony appear there and her motivation would be, I think germane to these proceedings.

JUDGE MALOUF: Concerning her underlying allegations, not the relation between her and anybody else.

MR. HERRMANN: No. Concerning her .... the coloration d of her allegations of reprisal by Mr. Hill and others in the division.

JUDGE MALOUF: And this witness has no personal knowledge of that, because she was not there at the time.

MR. HERRMANN: But she may have knowledge of the closeness of the two ....

JUDGE MALOUF: No. I don't. I still do not see the relevance. Let's continue.

[OFF THE RECORD]

[ON THE RECORD]

We're back on the record. I'm not sure the record will necessarily reflect the gap, but

we needed to adjust the equipment and we've back on the record. We did not have any substantive discussions while we were off the record. Mr. Herrmann, you may continue.

MR. HERRMANN: I'll pass the witness, Your Honor.

JUDGE MALOUF: Alright. cross-examination, Mr. Podbielski?

STATE OF TEXAS AFFIDAVIT

COUNTY OF BELL

Before me the undersigned official on this day personally appeared LORENA MANNING who is the person known to me and first being duly sworn according to law upon oath deposed and said the following:

"My name is Lorena Manning. I reside at Route 3, Box 46, Gatesville, Texas. I am over eighteen (18) years of age. I have never been convicted of a crime. I am full competent to make this Affidavit. I am well acquainted with all of the facts stated in this Affidavit and they are true and correct. I have been a resident of Coryell County, Texas, for 30 years.

"I am making this statement because I was not given the opportunity to discuss these facts during an earlier hearing in Royce Hill's case. I was prepared to testify to the type of situations in which Ca program management had to operate. I was surprised when the judge instructed me not to answer questions concerning some of those situations.

"I have been a civil service employee at Fort Hood, Texas since 1964. During the period of August 1984 through August 1989, I was a Branch Chief under the direct supervision of the Division Chief, Mr. O. Royce Hill. This working relationship began in the Directorate of Contracting and Commercial Activities (DCCA), and continued in the Directorate of Resource Management (DRM) when the CA Program Management function was transferred in May 1987.

"My branch dealt with Commercial

Activities (CA) Program policy development and implementation, and worked closely with Royce Hill. Managers and workers across the installation were deeply resentful of the program. Workers saw CA as a threat to their jobs and managers to their ability to continue managing in their accustomed style.

"Resentment of the CA Program was turned toward the individuals involved in managing the program. It was our job to make their organizations more efficient, but some managers viewed our discussions of needed changes as whistleblowing. Though all of us were targets of this resentment to varying degrees, Royce Hall received the brunt of it. He was single-minded, hard-charging, and very vocal about the program.

"There was also resentment, on the part of the top management level in DRM because CA Program Management had been taken from them and placed in DCCA in 1983. This was very much in evidence when the program was transferred back to DRM. CA members and other DRM personnel were "scrambled," with some of our best workers being placed in other DRM Divisions.

"Royce was put in a room where supplies were stored in the main DRM building, and my branch was put in the DRM conference room in an adjacent building. The other CA Branch was housed in a building across post. Royce's other branch chief was transferred to a position in the Management Division, and John Hamlin was assigned to a position, as a Branch Chief working for Royce. Royce was given no voice in the personnel assignments.

"It was while John Hamlin's branch was in the building across post that much of the sexual harassment is reported to have taken place. The one incident which so incensed the persons involved in the case was not reported

for over a year after its occurrence, and the person against whom it was perpetrated was not one of those who lodged a formal complaint. That incident, however, is what convicted John Hamlin in the eyes of everyone involved in dealing with the sexual harassment case.

"Another staff activity harboring long-term resentment of the CA program managers, and Royce in particular, was the G3/DPTM. This resentment began when we first became involved in applying CA laws and rules to workers in the G3 Range Division. It continued during the entire 4-year period of the CA Cost Study and subsequent Management Study. Any action in which CA Program Management personnel were involved met with both overt and covert resistance from G3 and DRM managers. (The majority of those managers are now retired or employed at other locations.)

"I was detailed to work as the Garrison Commander's Executive Assistant in September 1989, so I was not working in DRM during the time of the EEO complaints, investigations, and resulting actions. I was aware of them, however, through conversations with other DRM personnel.

"Several conversations with those persons concerned Royce's deteriorating physical and emotional conditions. Those of us who worked with Royce for several years had seen him fall down a number of times while going up or down stairs. One of the women still working in the area told me he was falling down more and more often, even on level surfaces, and was very hyperactive. She also said Royce had quit taking his anti-depressant, and expressed concern that it seemed to increase his hyperactivity.

"I would willingly testify to the above happenings and circumstances it asked. As stated above, I was prepared to do so earlier, but the judge did not allow me to answer some of the questions at the hearing.

Sworn to and subscribed before me on 27 July, 1992, by Lorena Manning.

Notary Public, State of Texas
Christopher S. Randall
Commission expires: 6 DEC 94

(ACKNOWLEDGMENT)

STATE OF TEXAS

COUNTY OF BELL

This instrument was acknowledged before me on the 27th day of July, 1992, by Lorena Manning.

Notary Public, State of Texas
Christopher S. Randall
Commission expires: 6 DEC 94

for which the offer was made.

JUDGE MALOUF: And to the extent that those are not relevant to that purpose or to my review of the case, then I will not review them. It's an offering as to state of mind. And I will consider it for that purpose only.

MR. PODBIELSKI: Only the portions dealing with Commercial Activities or the entire exhibit for state of mind?

JUDGE MALOUF: I can't .... because I haven't read the exhibit, Mr. Podbielski. I can't tell you, all I can tell you is that to the extent that the material is relevant to my determination and is relevant to the appellant's state of mind in figuring out all of this, I will consider it. If it is not relevant to his state of mind and relevant to my determination, I'm not going to consider it.

MR. PODBIELSKI: I understand.

JUDGE MALOUF: I don't know how else, you know, without pinpointing it and everything else, I don't know how else to tell you that

any exhibit as you well know, anything that's in the record at this point, is going to be considered; subject to, you know, appropriate weight and it's relevance to my determination.

MR. PODBIELSKI: I understand that, Your Honor, just that a very specific narrow purpose was behind this offer as opposed to other evidence.

JUDGE MALOUF: That's fine.

MR. PODBIELSKI: And their intended purpose. That's

Hill testified that there was nothing that the appellant was accused of that Dr. Hill thought was offensive at all. Dr. Hill indicated that the appellant had difficulty dealing with the stress of the environment and that the appellant was in what Dr. Hill called a "double bind" -- the appellant could not remove Hamlin from the situation and could not discuss the situation with the other employees.

What Dr. Hill's testimony failed to explain was how the appellant's mental condition of depression or the physical condition of neuropathy caused the misconduct that is at issue in this appeal. It is clear that the employees in the AOERD, including the appellant, were under a great deal of stress during the period from July 1990 through September 1990. However, there is nothing in the record demonstrating that the appellant's medical and/or mental conditions caused the charged misconduct. Thus, I find that the appellant has failed to establish a prima facie case of discrimination on the basis of a handicapping

condition.

The agency's action is not the result of reprisal for whistleblowing.

Although I have found that the agency's four charges against the appellant have been supported by preponderant evidence, the agency's action may not be sustained based on those charges if the appellant shows that the agency's decision was based on a prohibited personnel practice. 5 U.S.C. SS 7701(c)(2)(B). The appellant has alleged that the agency's decision to demote him was retaliation for his having engaged in whistleblowing activities, a prohibited personnel practice as described by 5 U.S.C. SS 2302(b)(8).

Whistleblowing is defined, in pertinent part, as "any disclosure of information by an employee ... that the individual reasonably believes evidences a violation of any law, rule, or regulation, or gross mismanagement of funds, an abuse of authority, or a substantial and specific danger to public health or safety." *See* 5 U.S.C. SS 2302(b)(8). Under the Whistleblower

Protection Act of 1989, Pub.L. No. 101-12, 103 Stat. 16 (1989)

(hereinafter referred to as WPA) , if an appellant shows that a disclosure described under 5 U.S.C. SS 2302(b)(8) was a contributing factor in the personnel action taken,[26] the action may not be sustained unless the agency demonstrates by clear and convincing evidence that it would have taken the same action in the absence of the disclosure. *See* 5 U.S.C. SS 1221(e) ; 5 C.F.R. SS 1209.11 (1990).

In order to establish a claim of reprisal for a protected disclosure, the appellant must show that: he made a protected disclosure and that the disclosure was a contributing factor in his demotion. *See Gergick v. General Services Administration,* 43 M.S.P.R. 651 (1990). The appellant alleged that he made several disclosures relating to contracting and one disclosure to the IG that constituted whistleblowing.

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26 The appellant must meet his burden of proof by a preponderance of the evidence. See 5 C.F.R. SS 1201.56(a)(2) (1991).

The contracting disclosures related to contracts concerning the firing ranges. According to the appellant, in 1986, in the course of his employment in the agency, he found problems with certain contracts. He claimed that the problems he found and reported, as part of his job between 1986 and 1987, constituted protected disclosures. The record does not state disclosures were protected disclosures, but assuming arguendo that those disclosures were protected, I find that they were not a contributing factor to the instant action. Appellant's submissions and his testimony reflected that those disclosures occurred more than--four years prior to the instant action. Accordingly, I find that they are too remote in time to be a contributing factor in this action. *See McDaid v. Department of Housing and Urban Development*, 46 M.S.P.R. 416 422-23 (1990) *Gergick*, 43 M.S.P.R. at 661.

According to the appellant, in February 1991, he made a protected disclosure when he reported to the IG that Colonel B., a military

officer on the post, was having an affair with a civilian employee. The record establishes that the appellant

reasonably believed that such conduct by Colonel B. constituted a violation of the Uniform Code of Military Justice contained in Title 10 of the United State Code. I find that under the instant circumstances, the appellant's disclosure was protected and constituted whistleblowing.

The agency did not dispute that the appellant made such a disclosure. Glosson, the deciding official, candidly acknowledged that he was aware that the appellant had made a disclosure to the IG concerning Colonel B. According to Glosson he learned about the disclosure in mid-February 1991, when General Wyrick mentioned it to him in his capacity as Garrison Commander and as part of the command group. The record reflects that at the time of the disclosure and at the time the instant action was affected, Colonel B. was not in the appellant's directorate or chain of command and was not under Glosson's chain of command. The record also reflects that Glosson had a higher

rank than Colonel B.[27] Glosson testified that he understood that the appellant had seen something and had made a report. Glosson indicated that he believed the appellant went to the IG. Glosson knew that the IG had conducted an investigation, but he did not know the results of the investigation. Glosson reported that the commanding general had concluded that there was no problem. Glosson testified that he did not discuss the AOER or the appellant with Colonel B. He stated unequivocally that neither of these instances had any affect on his decision. On cross examination, Glosson's testimony was that the appellant's disclosure had absolutely no influence on his decision of May 1991.

Although I have found that the appellant made a disclosure that constituted whistleblowing, I find that the disclosure was not a contributing factor in the appellant's

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27 It is undisputed that upon Glosson's retirement Colonel B. became the new garrison commander. This was subsequent to the instant action.

demotion. Thus, I find that the appellant has not shown that the agency's action

was based on reprisal against him for making protected disclosure.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:
Marie A. Malouf
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on November 14, 1991, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either

Q. In your uh, continuing doctor-patient relationship with Mr. Hill, have you had an opportunity to form an opinion whether or not he has sociopathic tendencies?

A. He does not.

Q. Excuse me, the proper response would have been, yes, I have.

A. Oh, yes, I have.

Q. And if you have then, what is that opinion?

A. Uh, his problem essentially is that he works too hard and tries too hard and is over-involved in things. That's been a .... made it hard for him.

Q. So then, essentially it's your opinion then he does not have sociopathic tendencies?

A. That is correct.

Q. Yet he is a person concerned about and involved in complying with rules and regulations of society and expectations of others?

A. He has uh, very high standards for himself as well as for other people, which

means that in the real world, he's often very disappointed and upset because people don't behave according to his high standards.

Q. You had him under continuing treatment essentially since 85, you said?

A. Yes.

Q. Have you been able to form an opinion concerning this

things has been high stress, but also he has had repeated bouts of depression through this part and even with that - I've never looked at the original record, but from what I've learned from him, even with the depression, much of that time he still was able to perform very well.

Q. Doctor, if there is substantial evidence in the record that the nature of his work involved sensitive activities directed at close analysis of management of whole activities, involving uh, groups of employed persons and determining possibly such issues as alternative management schemes that necessarily might point up mismanagement or might point up waste of funds or might point up non-compliance with regulations; in that kind of a contentious or adversarial prolonged activity, would this person have been in your opinion possibly subjected to any further vulnerability?

A. Well, yes. Uh, the way I would put that is, if it requires extra effort on his part to carry out ordinary activities, most of us wouldn't have to try so hard. Uh, he has been

depressed as well. And so he has had less reserve, uh, anyone will - if there's enough stress will begin to dysfunction. But most of us have a fair amount of reserve. That is a very stressful kind of activity to do when you're constantly.... try to do things that the whole organization doesn't want you to do.

[PAUSE]

Q. Doctor, again, in preparing you to testify here, I also

asked you to skim through and see part of the record consisting of the specific, the articulated charges against him, as items of misconduct. And you did familiarize yourself with those, did you not?

A. Yes.

Q. And without our going in and providing you with any argumentative facts or positions on those, isn't that correct?

A. That's correct.

Q. Excepting those at face value, do they alter your opinion about the predictions and prognosis that you have indicated?

A. No. In fact in the material I read, facts are very sparse. There's a lot of opinions.

Q. If it appeared that Mr. Hill during most of this episode, based on the facts accumulated in the record or to be accumulated, would placed into a position where he had no control to remove a perpetrator of sexual harassment, whose active force under his supervision, nor did insulate the victims of

that activity from further frustration or hostility and if he were also gagged or prohibited from discussing any of the substance of these problems with any of the people in that division, while an investigation was drug out on the whole matter for a period of over four months, would this in any manner contribute to his problems?

A. There is much. We call that a dull bond. If there is

no rational way out of that, it in fact, is one of the psychological theories of the causation of schizophrenia. It's an impossible circumstance.

Q. Was there indeed an aggravation or problem which arose out of this circumstance that I just related to you? Did he require treatment because of it?

A. Uh, he .... we .... as I understand the time sequences, we did the treatment, the intensive treatment about the time all of this was going on. Right toward the end of it, but at the time it was going on.

Q. In fact, the record shows that he was still in charge of that division at the time that he entered that period of psychotherapy for a month at Scott and White in October, approximately of 1990.

A. He had remained on medicine through the time that he was slipping, anyway.

Q. I pass the witness.

JUDGE MALOUF: Mr. Podbielski, cross-examination?

MR. PODBIELSKI: May I have a moment before I do that, to review my notes?

JUDGE MALOUF: Yes. I have a couple of questions. We'll do that, if you don't mind while you're reviewing your notes.

EXAMINATION

BY JUDGE MALOUF:

A. Yes. Because he's never had manic episodes.

JUDGE MALOUF: Mr. Podbielski?

CROSS EXAMINATION

BY MR. PODBIELSKI::

Q. Doctor Hill, from what Mr. Hill has described to you as being the nature of his duties, his responsibilities as a Division Chief; is it your impression that these were fairly consistent with what a person functioning as the Division Chief within a military organization was exposed to, the kinds of environment that he was exposed to?

A. Uh, how.... I'll answer this as I understand it. Which is, I think his job has been much more stressful than most people's. In the agency.

Q. Is that the feeling taken from what Mr. Hill has told you, or is it based on other independent comparisons that you have made?

A. Well, anybody whose job it is to be an inspector and to find people at fault has a very tough row to hoe. Not everyone does that.

Q. Would it not then be reasonable that another individual who was found in a comparable work environment with comparable level of responsibilities, may exhibit some of the similar frustrations that Mr. Hill has identified that he has?

A. Sure.

Q. When you were treating Mr. Hill within the 1989-1990

Clerk
7 Dec 92
United States Court of Appeals
for the Federal Circuit
717 Madison Place NW
Washington, D.C. 20439

RE: Transmittal of Informal Brief, Hill v Army, 93-3054

1. Enclosed are 1 original and 3 copies of my 14 page Informal Brief with all attachments. Each set has a different color binder.

2. Informal Brief has been distributed per Certificate of Service at page 14/14.

3. In attached Informal Brief, Judge Malouf stated in her Memorandum of Conference and Rulings at TAB J (issued at beginning of MSPB hearing on 25 Sep 90) that she had disapproved witnesses because they were not relevant to the case. Later she admitted on page 229, EXHIBIT I, Vol 2, (in the last-minutes at the end of the hearing on 27 Sep 90) that she had not even read beforehand, petitioner's Hearing Exhibit "A" dated 15 Sep 90, TAB H, citing whistleblowing as his primary affirmative defense. She could not possibly have evaluated this affirmative defense and rendered a fair and impartial initial decision against petitioner on whistleblowing, TAB K. since she had not heard petitioner's whistleblowing witnesses. Petitioner requests Judge Malouf's total decision (except handicap discrimination) be overturned by the Federal Circuit Court of Appeals and that he be made whole. Otherwise petitioner requests MSPB be ordered to properly hear his whistleblowing case as outlined in his Individual Right of Action Appeal at EXHIBIT II.

Sincerely

Orlon R. Hill
108 W. Briarwood Lane Harker Heights, TX 76543
Home, 817-699-2659
Work, 817-287-3956

4 Encls as

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Orlon R. Hill Department of Army

No. 93-3054

Informal Brief of Petitioner

Read the Guide for Pro Se Petitioners and Appellants before completing this form. Attach a copy of the initial decision of the administrative judge and the decision, if any, of the Merit Systems Protection Board (MSPB) or a copy of the Arbitrator's decision. Answer the following questions as best you can. Your answers should refer to the MSPB decisions or the Arbitrator's decision where possible. Use extra sheets if needed.

1. Has the petitioner ever had another case in this court? No In a United States District Court? No In the Equal Employment Opportunity Commission? Yes If so, identify each case.

EEOC PETITION NO. 03920063 Orlon R. Hill v. Department of Army

2. Did the MSPB or the Arbitrator incorrectly decide or fail to take into account any facts? If so, what facts? (Refer to paragraph 7 of the

guide.)

See continuation sheets 3/14 through 13/14

3. Did the MSPB or the Arbitrator apply the wrong law? Yes If so, what law should be applied?

Please see continuation sheets 3/14 through 13/14

4. Did the MSPB or the Arbitrator fail to consider important grounds for relief? Yes If so, what grounds?

Please see continuation sheets 3/14 through 11/14

5. Are there other reasons why the MSPB's or the Arbitrator's decision was wrong? Yes If so, what reasons?

Please see continuation sheets 3/14 through 13/14.

6d. Reverse Judge Malouf's initial decision dated 10 Oct 92 at TAB K including harmful error, whistleblowing, prohibited personnel practices, and diminished capacity (not handicap discrimination). Petitioner was singled out for demotion from 3 other people who were not disciplined so her analysis of tolerable limits

for punishment should be reversed. Make petitioner whole as enumerated in TAB E and TAB F. 6. What action (relief) do you want the court to take in this case?

a.Reverse MSPB final decision dated 5 Nov 92 at TAB C.

b.Reverse MSPB initial decision by Judge Carnes at TAB S.

c.Reverse MSPB final decision dated 24 Jan 92 at TAB N.

d.See continuation in paragraph 5 above.

7. Do you want to argue before the court in person? Yes. What are the reasons why argument will aid the court? (Refer to paragraph 15 of the Guide.)

a. Case is intertwined and complex over a long period of time.

b. Judge Malouf made many errors and got the facts mixed.

c. Petitioner has been unsuccessful in presenting his case in writing thus far perhaps because of inadequacies. May do better in person.

d. A terrible precedent hurting the EEO program

at Fort Hood has made. Petitioner wishes the opportunity to obtain justice for himself and for all other civilian employees at Fort Hood

Petitioner's signature

(Notary not required)

Mail an original and three copies of the informal brief and attachments to:

Clerk

U.S Court of Appeals

for the Federal Circuit

717 Madison Place, NW.

Washington, DC 20439

Serve a copy of the informal brief and attachments by mail on the respondent's attorney using the name and address on the notice of appearance form that was served on you by that attorney. Attach a copy of that notice of appearance form (noting thereon the date you served the respondent) to the original of your brief as your proof of service.

Before

United States Court of Appeals for

Federal Circuit

Hill v Army

9 3 - 30 5 4

CONTINUATION SHEETS FOR INFORMAL BRIEF

1. Transmitted at TAB B is Petition for Review (dated 12 Nov 92) of MSPB final decision Docket No. DA-1221-92-0394-W-1, dated 5 Nov 92 at TAB C. This Informal Brief has been properly mailed to be received by the Federal Circuit Court of Appeals within 21 days of 20 Nov 92 docket date. Petitioner regrets the extraordinary length of attachments and complexity of intertwined issues.

2. The Table of Contents for attachments to this Informal Brief, TAB A, has been structured chronologically by date to provide sequence of major events since MSPB became involved in this case. EXHIBITS are in separate volumes. Request all of these TABS and EXHIBITS be reviewed by the Court and that the MSPB decision be reversed and that the petitioner be made whole.

3. Pro se petitioner. A $100 personal check for the required Docketing Fee is at TAB D. (Furnished separately on 27 Nov 92)

4. EEOC was previously petitioned (Petition No. 03920063) on handicap discrimination but previous MSPB errors and negative decisions were accepted and magnified per petitioner's discussions in EXHIBIT V.

a. Petitioner's medical condition

(depression) and inherited neuropathy caused him to perform in a diminished capacity during the period of June 89 - Sep 90. Specific charges by the Agency cover the period Jun - Sep 90. COL Templer and COL Glosson also boxed in petitioner during this time thus preventing him from taking action to resolve the adverse and hostile environment. Petition's medical information is inseparable from his daily life and the MSPB case record to date. Whistleblowing, harmful error, prohibited personnel practice, and diminished capacity affirmative defenses are also inseparable in this case because the same people and events were involved. In most instances, 2 or more affirmative defenses are represented by the very same incident causing unavoidable repetition in this informal brief.

b. As described in paragraph 2 of IRA, EXHIBIT IV, petitioner's representative was ill at the MSPB hearing (25 & 27 Sep 91). He was on medical leave from the Texas State Bar from 1 Oct 91 until I May 92. He stated he was "drug under" in EXHIBIT IV TAB D. Petitioner has represented himself since 1 Oct 91.

c. Petitioner was not recovered from the depression, shock, and hurt caused by the discrimination and reprisals from COL Templer and COL Glosson intensifying and commencing in June 89. Accordingly petitioner's Pro se request for review, TAB L, on 8 Nov 91 about Judge Malouf's erroneous initial decision forwarded to the Board was considered inadequate by the Board. (Frommhagen v U.S., Ct.Cl. 1978, 573, F.2d 52.)

5. Petitioner abandons his handicap discrimination claims for this case (only during the period June 89 - May 91) forever so that the Federal Circuit Court of Appeals will have jurisdiction on whistleblowing, harmful error, prohibited personnel practices, diminished capacity and other defenses. The Court's form confirming this abandonment of claims was forwarded separately on 27 Nov 92.

6. This Informal Brief addresses the erroneous decisions and actions by Judge Malouf concerning Docket No. DA7529110549. This is because all subsequent decisions by Judge Carnes, TAB S. and the MSPB Board, TABs C and N, (for DOCKET Nos. DA7529110549 and DA-1221-92-0394-VI-1) have either cited her erroneous decisions or have been unexplained denials. Petitioner contends that Judge Malouf grossly erred in making conclusions and decisions about his whistleblowing defense because; (a) Office of Special Counsel had not first investigated whistleblowing charges and (b) he was not allowed to present witnesses and obtain testimony from witnesses about his whistleblowing.

7. In his 1st amendment to the initial appeal dated 19 Jul 91, TAB F, last page, Block 27; petitioner identified his whistleblowing as the major affirmative defense to Judge Malouf. Petitioner's Hearing Exhibit A listing his major disclosures and reprisals, dated 15 Sep 91 is at TAB H. There is no indication

whatsoever in the record that Judge Malouf or MSPB included these documents in their analysis and decision as requested by the petitioner. Petitioner contends that Judge M
Malouf did not comply with her responsibility and authority as a judge as required by 5 CFR 1201.41(b)(5)(ii)&(iii) and (10); as discussed in paragraph 9 below. This major error by her totally changed the outcome to being negative for the petitioner.

a. For brevity, specific whistleblowing disclosures and reprisals are not discussed in depth herein. Petitioner appeals to the Court to carefully consider TAB H which the Agency has not rebutted.
Petitioner's comment on page 1 of TAB H states "other retaliatory actions taken against Orlon R. Hill as reprisals for whistleblowing. It is the position of the Appellant that the adverse personnel action made the subject of the appeal is in fact the principal form of reprisal taken against Appellant for his past and continuing acts of whistleblowing. The remainder of TAB H provides details of the major whistleblowing (as a part of his assigned work) by petitioner since mid 1986, the personnel involved, and the resulting reprisals against him that have continued since that date. COL Templer was required to protect petitioner from reprisals (due to whistleblowing as a part of his job EXHIBIT II, TAB P) such as COL Baucum's and COL Bernier's dated

2 Feb 90. EXHIBIT II, TAB R, where they referred to petitioner in such terms as "half-assed, his henchmen, misinformation, poking nose, overzealous. and stiff arm". Petitioner contends that no protection for him as a whistleblower was provided by his supervisors, COL Templer and COL Glosson, as required by Sec 2 PL102-12(a). Although Judge Malouf ruled that petitioner had made a whistleblowing disclosure about COL Baucum's affair with his employee on bottom page 32 and top page 33, TAB K; she did not consider ruling that petitioner was not protected from reprisal by the Agency as required by 29 CFR 1613.261.

b. COL Glosson, the deciding official, was petitioner's 3rd line supervisor signing all performance ratings since end 1986 and knew, approved, or performed the reprisals against petitioner since 1986. Petitioner's PRIMARY affirmative defense was reprisal for whistleblowing. In the course of actions by agency against petitioner, they committed harmful error and prohibited personnel practices against him because of petitioner's diminished capacity. Judge Malouf used only pages 31-33 of her 35 page decision, TAB K, to make a major error to dismiss petitioner's whistleblowing defense. She erred by concluding on page 32 that disclosures were over 4 years old and occurred in 1986-87 and stating they were not relative to petitioner's case. MSPB has previously ruled in Clarence Gergick vs General Services Administration, 25 Jul 91, Docket No. SL12219OV10030 that the Whistleblower's Law can be used retroactively. Petitioner contends that disclosures and reprisals were continuous from 1986 until May 1991 as described in his Hearing Exhibit A, TAB H, which Judge Malouf admits she did not read before the hearing and there is nothing in the record that she read before making her decision. The MSPB has erred by them not recognizing and ruling on the continuous

pattern of petitioner's disclosures and reprisals against him as enumerated in TAB H and paragraph 1, EXHIBIT V.

c. These facts (and others below) were not considered by Judge Carnes in his initial decision to dismiss petitioner's IRA appeal res judicata. Instead, Judge Carnes relied on the erroneous conclusions made by his associate Judge Malouf. **A res judicata determination for whistleblowing by Judge Carnes was totally in error because petitioner had never been permitted by Judge Malouf to present his whistleblowing case prior to her making her initial decision nor had petitioner's case been reviewed by OSC before MSPB made final decision.**

8. Judge Malouf had erred by not reading petitioner's hearing Exhibit A (TAB H) concerning whistleblowing and related reprisals until after the 25 & 27 Sep 91 hearing. This led her to decide that the **4** charges against petitioner were upheld although petitioner was prohibited by Judge Malouf to question witnesses about his affirmative defense of whistleblowing. Her statement that she had not read Hearing Exhibit A, TAB H, is at EXHIBIT IV, TAB E, page (or EXHIBIT I, Vol 2, page 229) and was made in the closing minutes of the last day hearing on 27 Sep 91. Her not reading Exhibit A at TAB H (a document essential to the petitioner's whistleblowing defense) caused her to set a negative course in the hearing that violated petitioner's rights to adequately

present his case and examine witnesses. There is nothing in the record to show Judge Malouf ever considered TAB H before making her initial decision at TAB K. (Hanifan v. U.S., 1965, 354 F.2d, 358, 73 Ct.Cl.1053).

9. In her presiding over the hearing, Judge Malouf did not comply with the required responsibilities of a judge as required by 5 CFR 1201.41(b)(5)(ii)&(iii) and (10). Before the hearing, she apparently had already predetermined petitioner guilty as charged by, the agency, and that whistleblowing was not an issue to be heard. She expressed off the record that the hearing on the whistleblowing defense would be too long. In her MEMORANDUM OF CONFERENCE AND RULINGS dated and issued on 25 Sep 91 and before commencement of hearing, TAB J, She had already disallowed most witnesses needed by petitioner to provide facts about whistleblowing that he had raised in his 19 Jul 91 1st amendment to the 10 Jun 91 appeal TAB F with specific details provided in Hearing Exhibit A TAB H (Also at EXHIBIT II, TAB V, of Individual Right of Action Appeal).

10. At EXHIBIT IV, TAB G, are 19 pages of Judge Malouf's inappropriate directions that excluded evidence necessitated by 5 CFR 1201.56 (b) and 5 CFR 1201.61 and stopped questioning of witnesses that she had not already disallowed before the hearing. On pages 1-12 EXHIBIT IV, TAB G, Judge Malouf repeatedly stopped petitioner's representative from questioning COL Templer about issues related to whistleblowing although COL Templer was the recommending official per 5 U.S.C sec 2302(b) and therefore the Agency committed a harmful error and a prohibited personnel practice per 5 U.S.C. 7701(c)(2) A&B. She wrongfully insisted on pages 10-11 EXHIBIT IV, TAB G, that only the deciding official (COL Glosson) could be questioned about whistleblowing. Recommending Officials can

also be question per reference above. Her mistaken conclusion that only deciding official can be questioned is listed on midpage 28 of her decision TAB K.

11. On pages 16-19 EXHIBIT IV, TAB G, Judge Malouf stopped petitioner's questioning of Ms. Manning about her personal knowledge of Sheryl Remick and GEN Saint although they were two of the key players in causing the whistleblowing reprisals against petitioner as detailed in hearing Exhibit A which she had not read before the hearing. AT EXHIBIT IV, TAB H, IS AFFIDAVIT BY MS. MANNING CONCERNING PETITIONER'S WHISTLEBLOWING AND REPRISALS AGAINST HIM. SHE SUPPORTED SEVERAL OF THE ISSUES RAISED BY PETITIONER IN TAB H. Ms. Manning states in her affidavit that she was prepared to discuss whistleblowing by petitioner and reprisals against him at the hearing on 27 Sep 91 and was very surprised that Judge Malouf would not allow it.

12. Petitioner's representative had attempted to discuss Hearing Exhibit A, TAB H, with Judge Malouf early in the 25 Sep 92 hearing on page 17/19, EXHIBIT IV, TAB G (or EXHIBIT I, Vol 1, page 92). Since Judge Malouf did not reveal that she had not read Exhibit A until the very end of the hearing, there was no way for petitioner's representative to know that she had not followed proper judicial and

ethical procedures by reading Hearing Exhibit A, TAB H, with it's code references before the hearing and before making rulings affecting the whistleblowing affirmative defense. In the closing minutes late on 27 Sep 92, there was no opportunity for the petitioner's attorney to develop the harmful error, prohibited personnel practice, diminished capacity, and handicap affirmative defenses for whistleblowinq reprisals by the agency. Accordingly Judge Malouf made her initial 10 Oct 91 decision on the whistleblowing defense without allowing the petitioner to develop his case at the hearing by interviewing witnesses. This is a major error which resulted in a wrong decision for the petitioner. (Hanifan v. U.S., 1965, 354 F.2d, 356, 173 Ct.Cl.1053

13. Petitioner's Individual Right of Appeal (IRA) (MSPB Docket No. DP.1n--11-92-0394-W-1 dated 6 Mar 92, EXHIBIT II) is a direct result o@' Judge Malouf making several major errors about whistleblowing before and during the MSPB hearing Docket No. DA7529110549 held 1-5 and 27 Sep 92 at EXHIBIT I. These errors plus others relating to harmful error and prohibited personnel practice by the Agency and the petitioner's diminished capacity were reflected in her erroneous 10 Oct 92 Initial Decision at TAB K. Judge Malouf's major errors have been perpetuated within MSPB although petitioner had identified them to Judge Carnes and the MSPB Board.

14. The two OSC letters both dated 15 Jan 92 (both at EXHIBIT II, TAB stated the petitioner had the right to file an individual right of action appeal within 65 days. Petitioner acted in good faith with the OSC guidance and filed the individual right of action appeal to the MSPB Board on 6 Mar 92. There is no indication in the record that MSPB had received these letters prior to making the final decision dated 24 Jan 92 TAB N as

required by Kenneth E. Knollenberg v. MSPB, 91-3226, decided 14 Jan 92 by United States Court of Appeals for Federal Circuit.

15. Petitioner contends that no protection for him as a whistleblower was provided by his supervisors, COL Templer and COL Glosson, as required by Sec 2 PL102-12(a)(2) which states **"protecting federal employees who disclose illegality, waste, and corruption is a major step toward a more effective civil service. Petitioner contends that his supervisors also engaged in reprisal against him as described herein.**

16. a. A portion of page 13 of Judge Malouf's initial decision dated 10 Oct 91, TAB K, states **"In response, the appellant argued that the agency refused to move Hamlin out of the division during the pendency of the AR 15-6 investigation and refused to allow appellant to talk with subordinate employees about the situation. The appellant's contentions are supported by the record and by the testimony of COL Templer, the Director of Resource Management, and by the testimony of Mr. Bikoski."** Judge Malouf erred by applying her correct logic on page 13 to only one specification charged whereas it is directly applicable to all specifications in petitioner's TOTAL case. Judge Malouf's own conclusion proves the agency violated 29 CFR Chapter IV Section

1604.11 (d), EXHIBIT V, TAB 0, because petitioner's supervisors **had advance information themselves and had directly created the hostile work environment and required it** to grow worse to the detriment of the petitioner per paragraph 18 below.

b. Judge Malouf erred by not applying her own reference (paragraph 16 above) that COL Glosson and COL Templer were required by law to take immediate action to protect the harassment victims and they did not. All employees and the petitioner were "sentenced" to 5 months of hostile environment and near anarchy from May-Oct 90 while COL Glosson, the authorizing/approving official, purposefully approved the internal AR 15-6 investigation to drag on with the harasser remaining in the work area. This violated the victims rights to receive immediate relief from harassment from the Agency per 29 CFR Chapter XIV section 1604.11(d). The employees were never told that petitioner had attempted to have the harasser removed from the work area because of disapproval by COL Templer and COL Glosson. Also petitioner had been instructed by COL Templer not to discuss the harassment situation with the employees. Therefore, increased efforts by petitioner to maintain reasonable control and produce the required workload during the 5 month AR 15-6 investigation were futile thus driving petitioner farther into depression as stated by Dr. Paul Hill EXHIBIT V, TAB G.

c. Midpage 13 TAB K, Judge Malouf concluded that " There is nothing in the record that higher management (COL Templer and Mr. Bikoski) made any effort to alleviate the tension and problems in AOERD". Judge Malouf then erred in her conclusion at the bottom of page 1-D that petitioner had done nothing to improve the environment. Petitioner had attempted to remove the harasser from his victims however this was

disapproved by COL Templer and COL Glosson as she concluded in her statement paragraph 16a above. Ms. Phipps (one of the EEO complainants) stated in her USACARA testimony on 19 Nov 90, EXHIBIT III, TAB K, her disgust at COL Templer for leaving Hamlin the harasser in the workplace. She stated they would not have filed EEO complaints however it was obvious that "management across the hall" were sweeping the sexual harassment under the rug. This error by COL Templer and COL Glosson caused and continued the hostile environment that exacerbated petitioner's depression per testimony by Dr. Hill. See paragraph 2d of appellant's IRA EXHIBIT II.

17. a. Judge Malouf and the Board have erroneously ignored that the victims o.@ the sexual harassment <u>also</u> charged COL Templer (petitioner's Recommending Official and 2nd line supervisor), Mr. Bikoski (petitioner's 1st line supervisor), and Ms. Mulkey (petitioner's replacement) with reprisal and none of them were disciplined. These charges were made to the USACARA investigator before the 19 Nov 92 conference by Ms. Phipps, Ms. Jackson, and Ms. Remick at EXHIBIT II, TAB X. The Investigator concluded at EXHIBIT II. TAB Y, that " management officials" "they" had committed reprisal. Petitioner was <u>not</u> singled out by USACARA as the only manager causing a hostile environment. USACARA stated in the recommendations of the final report EXHIBIT II, TAB Y, that "DRM is in a severe state of health". COL

Glosson stated in his testimony at EXHIBIT II, TAB Z, that he knew these three people in addition to the petitioner also were charged.

b. COL Templer, the recommending official per 5 U.S.C. sec 2302(b), at EXHIBIT IV, TAB Q, denies knowing he was also charged by the complainants. This is a harmful error and prohibited personnel practice in accordance with 5 CFR 1201.56(c)(3) and 5 U.S.C. 7701(c)(2). COL Glosson stated on page 4/5 line 9, EXHIBIT II, "I told COL Templer. Either COL Templer lied in his hearing testimony or COL Glosson committed harmful error against petitioner by withholding the information from COL Templer. Had COL Templer known that himself, Mr. Bikoski, and Ms. Mulkey had also been charged for reprisal by the complaints, he would have viewed the USACARA reports differently and recommended a much lessor adverse action upon the petitioner. Judge Malouf made a serious error by not recognizing this harmful error.

18. a. COL Glosson was petitioner's 3rd line supervisor since 1986, deciding official, AR 15-6 authorizing/approval authority, and Responding Management Official named in petitioner's EEO complaints in Apr 91. COL Glosson had very large conflicting responsibilities and interests serving as petitioner's deciding official. He would not remove the harasser from the victims as requested by the petitioner. He approved extending the AR 15-6 investigation for over 5 months whereas COL Glosson had the authority and responsibility to have required it be completed in 2-3 weeks. He lied about not haiing record of petitioner's handicap as discussed in paragraph 20 below. Also see paragraph 19 below. This is harmful error per 5 CFR 1201.56(c).

b. In her statement from the AR 15-6

investigation, Ms. Hiltz at EXHIBIT IV, TAB V, implicates her own husband, Jim Hiltz, (the CPC Officer) and Col. Templer as having advance information of sexual harassment by Hamlin several months before petitioner; they took no immediate action to protect the harassed victims as required. COL Glosson confessed in testimony at EXHIBIT II, TAB J, that himself and Jim Hiltz spoke about Hamlin's harassment as early as Sep 89 (9 months before petitioner knew) yet neither told petitioner took immediate action to protect the victims and petitioner as required by 29 CFR Chapter XIV section 1604.11(d) at EXHIBIT V, TAB 0. COL Glosson's confession makes him totally responsible for the Agency as the Garrison Commander per section 1604.11(c) and petitioner should not be held responsible or accountable. Petitioner was not told by anyone of the sexual harassment until 1 May 90 but then he was restricted from action to stop the harassment per paragraph 16 above. COL Glosson decided to leave Hamlin in the work environment and drag the AR 15-6 investigation out from May-Oct 90, and COL Templer stated on page 3/3, EXHIBIT II, TAB M, that he directed petitioner not to discuss sexual harassment or take any actions against Hamlin because petitioner would be interfering with AR 15-6 investigation.

19. Paragraph 8 of petitioner's IRA, EXHIBIT II, addresses that COL Glosson serving as deciding official was conflict of interest violation of Army Regulation (AR) 690-600 since he was named as respondent in

formal EEO complaint filed by petitioner at that time.

a. COL Glosson was biased against the petitioner because he occupied the roles of investigator and adjudicator ant the same time. He was the Authorizing and Approving Official for the AR 15-6 investigation which he delayed and caused the hostile environment in AOERD. He also acted as the deciding official in issuing his decision to downgrade petitioner in his 10 May 91 decision letter at EXHIBIT II, TAB G. (Schaefer v. U.S., 1980, 633, F2.d 945, 224 Ct.Cl. 541)

b. Had COL Glosson acted properly and removed Hamlin from the worksite when he first knew in Sep 89 (or even later in early May 90 as requested by the petitioner), the EEO complaints and charges against petitioner would have been totally precluded. This is a harmful error and prohibited personnel practice in accordance with 5 CFR 1201.56(c). Petitioner being singleminded and naive because of his handicap precluded him from gleaming sexual harassments by Hamlin outside petitioner's conscious view, awareness, and/or attention focus.

20. Petitioner did not take major actions (other than attempting to remove the harasser) because he was directed to take no action as concluded by Judge Malouf on page 13 of her initial decision at TAB Y as stated in paragraph 16a above. Judge Malouf erred on page 26, 27, and 28 of her decision by believing COL Glosson and COL Templer when they lied there was no record of petitioner's medical condition and Judge Malouf's initial decision states: **"There is some question whether the agency knew of the hearing reflected a difficulty walking and also some medication. The record not indicate to the agency that he had a handicapping condition until after the action was proposed.**

a. Judge Malouf erred in not believing COL Templer's testimony at page 2/6, line 16, and page 4/6, line 20, EXHIBIT II, TAB H, whereby he confessed he knew beforehand of petitioner's depression, medical, and handicap conditions in June 90 before any reprisals allegedly were made by petitioner between Jun-Sep 90 and 9 months and before the proposed action to demote him was made by COL Templer in his letter dated Mar 91. Although confessing that he had known since Jun 90 that petitioner was depressed; COL Templer then also singled petitioner out for punishment per paragraph 17 above and proposed the downgrade in letter dated 22 Mar 91 after petitioner had reported COL Baucum to IG on 12 Feb 91. COL Templer committed harmful error against the petitioner in accordance with 5 CFR 1201.56(c). As testified by Dr. Hill, petitioner had major depression at the time caused by the hostile environment for which he could not control due to decisions by COL Templer and COL Glosson. COL Templer was insensitive and erred and should not have recommended a downgrade had he "remembered" petitioner's depression because of diminished capacity.

b. Judge Malouf erred by not considering that COL Glosson, the agency deciding official, confessed at line 1, page 3/9, EXHIBIT II, TAB F, that petitioner had explained his handicapping condition to him in early 1988 when COL Glosson committed reprisal in public against petitioner for not having his collar buttoned and tie taut. Therefore, Judge Malouf erred again by believing Glosson on bottom page 26 TAB K, by concluding "He indicated because there was nothing in the file to demonstrate that the appellant was handicapped, he did not consider appellant's allegation of handicap discrimination". COL Glosson had lied in the hearing.

c. Judge Malouf made a serious error in concluding that petitioner had not made any attempt to improve the environment as she concluded on page 17, TAB K. Had Judge Malouf and the Board not erred, handicap discrimination against the petitioner may have been sustained resulting in a totally different final decision. As a minimum, this was a harmful error by the agency against the petitioner in accordance viith 5 CFR 1201.56(c)(3).

21. a. Judge Malouf erred by not considering 5 CFR 752.404(c)(3) whereby petitioner <u>may submit medical evidence after-the-fact for consideration</u> by the agency as part of his response to the agency. There is nothing in the record indicating whatsoever that COL Templer or COL Glosson considered petitioner's medical documentation before petitioner was demoted on 19 May 91. The Agency <u>must</u> consider petitioner's medical documentation under 5 CFR 752.404f and advise the petitioner that documentation has been considered. COL Glosson did not do this nor did he require petitioner to take another medical examination. Judge Malouf erred by not making sure that the Agency had considered all factors relevant to the case such as

medical documentation (Hayes v. Department of Navy, C.A. Fed 1984, 727 F.2d 1535).

b. She made another error on bottom page 29, TAB K, by concluding that petitioner had submitted no medical documentation until responding to deciding official, COL Glosson, on 12 April 91. (In her own note 25 TAB 7, she had stated that a letter from Dr. Paul Hill was provided to COL Templer on 6 Sep 90 stating petitioner needed one month of psychiatric treatment for depression.) This letter was 7 provided months before COL Templer proposed downgrading petitioner in his letter dated 22 Mar 91. Petitioner submitted this evidence officially in the form of letters dated 6 Sep 90 and 28 Mar 91 from Dr. Paul Hill, EXHIBIT V, TAB G, and was included in petitioner's response to deciding official on 11 Apr 91. Judge Malouf and the Board erred by ignoring Dr. Hill's letter, affidavit, and MSPB testimony EXHIBIT I, VOL 2, whereas he stated that petitioner's major clinical depression at the time of the charges against hims the hostile work environment, and petitioner having no control over the work environment forced him into greater depression. Dr. Hill's statements prove that petitioner's diminished capacity included lack of concentration, memory, alertness, stamina, and several other inadequacies at the time of charged offenses. Additionally an affidavit from Dr Hill dated 10 Jun 91 WITH

COPY OF APPELLANT'S MEDICAL RECORDS (not in TAB E) were forwarded to Judge Malouf in petitioner's 10 Jun 91 appeal at TAB E.

c. Judge Malouf even expressed inappropriate conclusions on pages 13-15 EXHIBIT IV, TAB G, about the petitioner's handicap before hearing the testimony of Dr. Paul Hill. She concluded the petitioner was not handicapped because she could not see it from her distance.

22. Judge Malouf and the Board erred when they did not make the obvious causal connections between petitioner's medical condition and the COL Templer's and COL Glosson's conduct that led to his downgrade and reprisals as follows:

a. COL Templer testified at page 2/6, line 16, EXHIBIT II, TAB H, that he knew of petitioner's depression in June 90 (prior to any alleged reprisals by petitioner). COL Glosson testified at page line 24, EXHIBIT II, TAB J, that he was told of the sexual harassment by Mr. Hiltz as early as Sep 89. After petitioner was told of Hamlin's harassment on 1 May 90, although petitioner requested the harasser be moved out immediately (see Judge Malouf's statement paragraph 16a above), COL Templer and COL Glosson decided to leave the harasser in the work area with his victims until the 5 month AR 15-6 investigation was completed in Oct 90. (During this same period, petitioner had no control over the work area, employees were distraught, and thereby charged petitioner with reprisal in addition to COL Templer, Mr. Bikoski, and Ms. Mulkey.) They both then TOTALLY assumed AGENCY responsibility from the petitioner per 29 CFR 1604.11(c); therefore petitioner should not be held responsible and accountable for the hostile environment imposed by his supervisors.

b. Petitioner was therefore entitled to freedom from reprisal from the Agency per 29 CFR 1613.261. Action by COL Templer and COL Glosson violated 29 CFR 1604.11(d) and directly created and forced the hostile environment on the sexual harassment victims (and therefore the appellant also) knowing he was depressed and handicapped. Judge Malouf erred because properly submitted medical evidence established time COL Templer and COL the petitioner's 1990, 44M.S. PR 308) petitioner to take no sexual harassment with that this one uniquely hostile work environment exacerbated petitioner's depression although petitioner had performed exceptionally throughout his career.

c. COL Templer partially justified the downgrade on petitioner's loud voice which is caused by petitioner's inability to modulate his voice as stated by Dr. Hill in paragraph 2, EXHIBIT III, TAB H.

d. Judge Malouf even expressed inappropriate conclusions at the beginning of the hearing on 25 Sep 91, EXHIBIT V, TAB AA, about the petitioner's handicap before hearing the testimony of Dr. Paul Hill.

Petitioner contends that Judge Malouf was not openminded, fair, and impartial before, during and after the hearing and in considering documentation which caused her to be biased in support for the agency.

23. COL Glosson lied about petitioner's whistleblowing (like he lied about other instances in paragraphs 17b and 20b above) Re: COL affair not affecting his decision against petitioner. Judge Malouf's statement on page 33, TAB K, stating "He unequivocally stated that neither of these instances had any affect upon his decision." indicated she erroneously believed him. Judge Malouf concluded on page 33, TAB K, that petitioner's reporting COL Baucum's affair on 12 Feb 91 was a whistleblowing disclosure. She did not recognize that COL Baucum had previously took reprisal action against petitioner in his note dated 2 Feb 90, EXHIBIT II, TAB R. (COL Baucum and COL Bernier predetermined the recommending official COL Templer in these notes by using such derogatory terms as half-assed, his henchmen, misinformation, poking nose, overzealous, and "had to stiff arm him before"). There are several instances discussed in this informal brief above that destroys COL Glosson's as well as COL Templer's creditability.

CERTIFICATE OF SERVICE

I certify that the petitioner's informal brief 93-3054 (Hill v Army) for petition for review of MSPB final decision Docket No. DA-1221-92-0394-W-1, with all TABs and EXHIBITS, has been furnished this date to the following parties:

By certified mail to:

Clerk
United States Court of Appeals
for the Federal Circuit
717 Madison Place NW
Washington, D.C. 20439

By regular mail to:

Mr. David M. Cohen
Department of Justice
Washington, D.C. 20530

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Ave NW., Suite 802
Washington, DC 20419

Thaddeus A. Podbielski
HQ III Corps and Fort Hood
Office of Staff Judge Advocate
Fort Hood, TX 76544-5056

Dec 92
Orlon R. Hill

Q. Did the fact that reprisal can carry a potential penalty of removal from federal service, recognizing it was not available to you, not one of your options, but recognizing that the charge itself can carry that kind of penalty ....

A. Sure.

Q. .... did that enter into your equation?

A. Sure. Although it was not an option to me at this time, I think acts of reprisal can be so severe that removal would be the appropriate offense.

Q. Did you see any evidence, in reviewing the facts that support the charges, that showed you that Mr. Hill had tried to defuse the tension in the work site, regardless of what may have caused it, but that he had affirmatively tried to get things to come down to a calm workable level?

A. I saw no visible evidence that he made any attempt to clean up the work

environment. There was just nothing there. In fact, the work environment had to be cleaned up by me as a result of the results of the USACARA investigation, to get all the remedies and to get the positions worked out to reassign the people outside of the DRM office.

Q. Did you consider any factors that might have been possible in mitigation in this case, as to.... maybe there was an excuse or an explanation as to why he behaved the way he did at that time?

A. As I indicated earlier, I did consider Mr. Hill's

important deadlines. Glosson also considered the seriousness of the offense and time period in which it occurred, the agency's table of penalties, the impact on other employees. Glosson stated that a serious negative factor was the appellant's attempts to deflect the responsibility for what happened on to someone else. I find that Glosson properly considered the relevant factors in determining the penalty. Both the decision letter and Glosson's testimony reflected his thorough review of the case. In this appeal the penalty of demotion does not exceed the tolerable limits of reasonableness. The appellant has not shown that the agency committed harmful procedural error in the processing this action.

The appellant alleged that the agency committed harmful procedural error[22] in the

22 Harmful error is error by the agency in the application of itl procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is on the appellant to show that the error was harmful, i.e., that it caused substantial harm or prejudice to his rights. 5 C.F.R. SS 1201.56(c)(3) (1991).

processing of this action by (1) denying him the required personnel support, counseling, and guidance on the subjects of the agency complaints in this case; (2) failing to provide him with due process; (3) prejudging his guilt and punishment in the proposal notice; (4) failing to take Hamlin out of the workplace. The appellant asserted that the agency failed to provide mid-term efficiency ratings or appropriate counselings on any of the subjects, and failed to make written counseling records concerning any actions or shortcomings. Further, the appellant contended that he was denied the notice of appropriate procedures and his personal exposure in the EEO investigations. Finally he argued that he was never referred to the employee assistance program. If the appellant establishes that the agency committed harmful procedural error, the action cannot be sustained. 5 U.S.C. SS 7701(c)(2); 5 C.F.R. SS 1201.56(b)(1) (1991).

(3)

93-158

Supreme Court, U.S.
FILED
JUN 21 1993
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

Orlon R. Hill, PETITIONER

VS.

United States Army, RESPONDENT

PETITION FOR WRIT OF CERTIORARI

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

APPENDIX B TO
PETITION FOR WRIT OF CERTIORARI

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

ORLON R. HILL, Appellant,	)	DOCKET NUMBER DA-1221-92-0394-W-1
V.	)	
DEPARTMENT OF THE ARMY, Agency.	)	DATE: June 30, 1992

Orlon R. Hill, Harker Heights, Texas, pro se.

Thaddeus A. Podbielski, Esquire, Fort Hood, Texas, for the agency.

BEFORE

William W. Carnes
Administrative Judge

INITIAL DECISION

Orlon R. Hill filed with the Board on March 6, 1992,[1] what appeared to be an individual

1 This appeal was filed with the Clerk of the Board in Washington, D.C., on March 6, 1992. Because individual right of action appeals should be filed in the appropriate Board regional office, this appeal was subsequently forwarded to the Dallas Regional Office for processing, and was not received until April 20, 1992.

right of action (IRA) appeal, after having first sought corrective from the Office of Special Counsel regarding alleged reprisal for whistleblowing in connection with his demotion on May 19, 1991.

For the reasons set forth below, the appeal is DISMISSED.

ANALYSIS AND FINDINGS

The appellant previously appealed this same demotion action to the Board.

The appellant was formerly a GM-13 Supervisory Management Analyst and the Chief of the Army Organization Efficiency Review Division at Fort Hood, Texas. On May 19, 1991, he was demoted by adverse action to the position of GS-11 Program Analyst. On June 10, 1991, the appellant appealed that action to the Board.

Following a hearing on that appeal, Administrative Judge Marie A. Malouf sustained all charges of misconduct and affirmed the

change-to-lower-grade action.[2] *See Hill v. Department of the Army*, MSPB Docket No. DA07529110549, Initial Decision issued October 10, 1991, see copy in appeal file, tab 7(4e). In that appeal, the appellant raised as affirmative defenses, inter alia, discrimination on the basis of handicap and reprisal for protected whistleblowing disclosures. Judge Malouf reviewed the evidence on these issues and found that none of the affirmative defenses were proven. Id.

After receiving that Initial Decision affirming his demotion, the appellant filed a petition for review with the Board under the provisions of 5 C.F.R. SSSS 1201.114-.117. The Initial Decision became the Board's final decision when, on January 24, 1992, the Board denied the appellant's petition for review.[3]

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2 Judge Malouf found that a preponderance of evidence supported the four charges against the appellant. These misconduct charges included the appellant having taken reprisal against four subordinate female employees in his division for having pursued discrimination complaints, creating a threatening and hostile work environment, and aggravating an offensive work atmosphere. See appeal file, tab 7(4e).

3 Subsequent to this final action by the Board, the appellant has apparently filed a petition with the Equal Employment Opportunity Commission for further administrative review of the discrimination issues raised in that appeal.

Hill v. Department of the Army, 52 M.S.P.R. 124 (1992) (Table), see copy in appeal file, tab 7(4b).

The appellant filed a complaint with the Office of Special Counsel alleging that his demotion was a prohibited personnel practice.

The record shows that the appellant also filed a complaint with the Office of Special Counsel (OSC) about this same matter. He provided with the current appeal copies of two letters from OSC, dated January 15, 1992, showing that he had filed a complaint with that agency alleging that his May 19, 1991, demotion was in reprisal for whistleblowing and was discriminatory on the basis of a handicapping condition.[4] *See* appeal file, tab 1(B). The notices advised the appellant that OSC was that day closing its file on his complaint, and that, because he had alleged

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4 The complaint filed with OSC by the appellant has not been provided; however, this correspondence from the OSC, submitted by the appellant, clearly shows the subject of his complaint was the demotion of May 19, 1991, and his allegations of reprisal for whistleblowing and handicap discrimination. See appeal file, tab 1(B).

reprisal for whistleblowing, if he was not satisfied with OSC's action on his complaint, he had 65 days from the date of that notice to request corrective action from the Board. *Id.* The current appeal was thus filed with the Board, based on these notices from OSC.

The agency challenged the Board's jurisdiction to review this matter as an IRA appeal.

In response to the appeal, the agency submitted, inter alia, a motion to dismiss. Appeal file, tabs 5 & 7. It argued that identical issues were presented to the Board in connection with the appellant's prior appeal, heard and decided by Judge Malouf, and which, as of January 24, 1992, was now a final decision of the Board. The agency argued that this matter is res judicata, and should be dismissed.

Because of the background evident in this appeal, and the agency's motion to dismiss, the appellant was issued an order on May 18, 1992, to show cause why this appeal should not be dismissed. See appeal file, tab 6. He was advised that he bears the burden of proof on issues of jurisdiction and provided an

opportunity to respond. The appellant responded to this Order. See appeal file, tab 8.

He contended that this matter was not res judicata, because Judge Malouf had not properly considered all of the evidence on his case and she had improperly conducted the hearing. He argued generally that the evidence, if properly considered, would show that he was discriminated against due to his handicapping condition, and that the agency officials had demoted him in reprisal for his protected whistleblowing activities. *Id.* He contended that the whistleblowing reprisal issue had not properly been before the Board in the appeal decided by Judge Malouf, because he had not then taken the matter before OSC. Thus, he argued, citing *Knollenberg v. MSPB,* 953 F.2d 623 (Fed. Cir. 1992)[5] that since he has now completed the

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5 In *Knollenberg,* the court affirmed the Board's dismissal, for lack of jurisdiction, an appeal involving a nonselection for a position, alleged to be in reprisal for whistleblowing. Because that action was not an otherwise appealable matter, it was appealable to the Board only as an IRA appeal. Since the appellant had not first sought corrective action from OSC, the Board lacked jurisdiction to accept that matter as an appeal at that time. *Knollenberg,* 953 F.2d at 625-26.

complaint process with OSC, this is a matter properly before the Board as an IRA appeal. The remainder of the appellant's arguments relate primarily to the merits of his claim raised in his prior appeal (DA07529110549) of the demotion action and his disagreement with the findings by Judge Malouf. Id.

The personnel action that is the subject of this appeal is an otherwise appealable action.

The Board's regulations implementing the provisions of the Whistleblower Protection Act of 1989 (WPA) are found in 5 C.F.R. Part 1209. There are two types of appeals covered by these provisions -- (1) an otherwise appealable matter which includes an allegation of reprisal for whistleblowing, and (2) an IRA appeal. 5 C.F.R. SS 1209.2 (1992). As discussed by the court in *Knollenberg*, an IRA appeal involves a matter which cannot be appealed to the Board, except for the new provisions of the WPA. *Knollenberg*, 956 F.2d at 525-26. In order for the Board to have jurisdiction in an IRA appeal, the appellant must have first sought corrective action from

OSC on his or her complaint that the personnel action involved was the result of reprisal for protected whistleblowing, as defined by 5 U.S. C. SS 2302 (b) (8) *Id.; see also* 5 C.F.R. SSSS 1209.1 -.5 (1992).

For an otherwise appealable action, an appellant may choose either to seek corrective action from the OSC before appealing to the Board or to file the appeal directly to the Board. See 5 C.F.R. SSSS 1209.2(b)(2), .5(b) (1992). The personnel action involved in this appeal, the prior appeal, and the complaint before OSC, is the appellant's change to lower grade on May 19, 1991. Such an adverse action demotion does not have to first be taken before OSC before it can be appealed to the Board, like an IRA appeal must.[6] A demotion is an action otherwise appealable to the Board, with or

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6 In an IRA appeal of an action that is not otherwise appealable to the Board, the only issue presented to the Board for adjudication is the issue of whether the personnel action in question was taken (or not taken) in reprisal for the appellant's whistleblowing disclosure(s) protected by 5 U.S.C. SS 2302(b)(8), and does not include issues of alleged discrimination. *See Marren v. Department of Justice,* 51 M.S.P.R. 632, 638-39 (1991).

without allegations of whistleblowing reprisal. *See* 5 U.S.C. SS 7511-7513; 5 C.F.R. SS 1201.3 (1992) . Thus, when first appealed to the Board in June 1991, the matter was properly held to be within the Board's jurisdiction and was adjudicated on the merits, along with all appropriate affirmative defenses raised, including the claim that this action was taken in reprisal for whistleblowing.

This appeal is res judicata.

The doctrine of res judicata applies to prevent repetitious litigation on the same cause of action. *See, e. g. , Wilson v. Turnage,* 791 F.2d 151, 156 (Fed. Cir.), cert. denied, 479 U.S. 988 (1986) . An issue is res judicata if there is identity of the cause of action as well as identity of parties. *See, e.g., Cody v. Department of Transportation,* 17 M.S.P.R. 572 (1983) . Where there has been a final judgment on the merits of an action, it precludes either of the parties from relitigating issues that could have been raised in the prior appeal. *See, e.g., Wilson* v. United *States Postal Service,* 32 M.S.P.R. 2 4 4 ,

247-48 (1987).

On January 24, 1992, the Board issued its final order on the appellant's prior appeal of his demotion action. In that appeal, the issue of reprisal for whistleblowing, along with several other issues, was raised. It was heard and adjudicated by the judge in that case. The parties in that prior appeal were the same as in the instant appeal.

It is clear that the appellant is now attempting to have the same matter he previously appealed reconsidered by the Board. He states in this appeal that what he seeks is to have the Board "reopen, reconsider, and issue a new final decision" on that prior appeal (DA07529110549) . See appeal file, tab 8, at 10. The appellant's disagreement with the administrative judge's analysis and findings regarding the evidence in that appeal, as well as his challenges to the way she conducted that proceeding, are matters that were or could have been challenged in that appeal and in the petition for review.

When the appellant received the Board's

Order of January 24, 1992, informing him that his petition for review was denied, it also advised him that it was the "Board's final order in this appeal" and that Judge Malouf's initial decision was now the Board's final decision. *See Id.* at tab 7 (4b) . While the appellant was given the right to pursue further administrative review from the Equal Employment Opportunity commission on the discrimination issue, that review pertains only to the claims of discrimination, not whistleblowing issues.

I find that the matter the appellant now seeks to have the Board review is the same action that was adjudicated by the Board in his prior appeal (DA07529110549) . Moreover, the issue of whether the demotion action was in reprisal for whistleblowing was addressed and found to be unsupported by the evidence. See pages 31-34 of prior initial decision, at appeal file, tab 7 (4e). Because the Board issued a final decision in that appeal, I find that the appellant is precluded by the doctrine of res judicata from bringing this same matter before the Board again. The

fact that OSC may have issued the appellant a notice which, inter alia, also advised him that he could further pursue the matter before the Board under the provisions of 5 C.F.R. Part 1209, does not itself grant the appellant a new right of appeal. Where a final decision on the same matter has already been issued by the Board, the Board is not bound to accept the subsequent appeal of the same action as a matter within its appellate jurisdiction based on such a notice from OSC. *See Lapedis v. Department of Health and Human Services*, 47 M.S.P.R. 337, 342, *aff'd*, 949 F.2d 403 (Fed. Cir. 1991) (Table).

In this case, the appellant has previously appealed his demotion by the Department of the Army to the Board, as an otherwise appealable action. The instant appeal involves the same cause of action, the same parties, and the same whistleblowing issue already litigated and decided by the Board Accordingly, this appeal is dismissed as res judicata.

DECISION

The appeal is DISMISSED.

FOR THE BOARD: William W. Carnes

Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on August 4, 1992, unless a petition for review is filed by that date or the Board in that first reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or thc federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached document was sent by regular mail this day to each of the following:

Appellant

Mr. Orlon R. Hill
108 West Briarwood Lane
Harker Heights, TX 76543

Agency Representative

Thaddeus A. Podbielski, Esquire
Labor Counselor
Office of the Staff Judge Advocate
HQ, III Corps an Fort Hood
Fort Hood, TX 76544-5056

Other

Ms. Marjorie Marks
Office of Personnel Management
Employee Relations Division
1900 E Street, NW., Room 7412
Washington, DC 20415

June 30, 1992
(date)

_____
Rolayne Campau
Clerk

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ORLON R. HILL, Appellant, V. DEPARTMENT OF THE ARMY, Agency.	DOCKET NUMBER DA1221920394-W-1 DATE: NOV 5, 1992

Orlon R. Hill, Harker Heights, Texas, pro se.

Thaddeus A. Podbielski, Esquire, Fort Hood, Texas, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on June 30, 1992, because it does not meet the criteria for review set forth at 5 C.F.R. SS 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R.

SS 1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final Decision in your appeal if the court has jurisdiction. See 5 U.S.C. SS 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. SS 7703(b)(1).

FOR THE BOARD:

_____
Robert E. Taylor
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this ORDER was sent today:

By certified mail to:

Orlon R. Hill
108 West Briarwood Lane
Harker Heights, TX 76543

By regular mail to:

Thaddeus A. Podbielski, Esquire
Department of the Army
Office of the Staff Judge Advocate
HQ, III Corps and Fort Hood
Fort Hood, TX 76544-5056

Marjorie Marks
Office of Personnel Management
Employee Relations Division
1900 E Street, N.W., Room 7412
Washington, DC 20415

Merit Systems Protection Board
Dallas Regional Office
1100 Commerce Street, Room 6F20
Dallas, TX 75242

By hand to:

Office of Special Counsel
1120 Vermont Avenue, N.W.
Washington, DC 20005

N O V - 5 1992

(Date)

Washington, D.C.

Robert E. Taylor
Clerk of the Board

Supreme Court, U.S.
FILED
SEP - 9 1993
OFFICE OF THE CLERK

No. 93-0158

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ORLON R. HILL,

Petitioner

-

vs.

UNITED STATES ARMY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT AND THE
MERIT SYSTEMS PROTECTION BOARD

SUPPLEMENTAL BRIEF NO. 1
TO
PETITION FOR WRIT OF CERTIORARI

Orlon R. Hill
108 W. Briarwood Lane
Harker Heights, TX 76543
Home Ph., 817-699-2659
Work Ph., 817-287-3956

SUPREME COURT OF THE UNITED STATES

October Term, 1993

Orlon R. Hill, Petitioner)
vs.)
United States Army, Respondent)

SUPPLEMENTAL BRIEF NO 1
PETITION FOR WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Petitioner, Orlon R. Hill, respectively prays the Court considers a recent and related decision by the United States Court of Appeals for the Federal Circuit not available to Petitioner when Petition was submitted on 23 Jul 93. Marano v. Dept. of Justice, 92-3132, Aug 4, 1993. The Appeals Court ruled there was a whistleblowing disclosure prior to adverse actions against the employee and that his reassignment was "inextricably intertwined" with the disclosure. The Circuit Court ordered that the case be reconsidered with the burden of proof on the agency. This decision by the

Appeals court is correct but totally inconsistent with their previous ruling of res Judicata in this case (MSPB DOCKET NO DA-1221-92-0394-W-1) as argued below.

Petitioner's Hearing Exhibit "A" for MSPB DOCKET DA7529110549, (pages 34-82 of Appendix A to Petition) was NOT read by Judge Malouf in this first case before or during the hearing on 25 and 27 Sep 91. As stated by Judge Malouf on page 33 of petition:

> "I can't,... because I haven't read the exhibit, Mr. Podbielski, I can't tell you"

The Judge made this statement within minutes of completing the last day of hearing on 27 Sep 1991. She had already disapproved Petitioner's whistleblowing witnesses and disallowed whistleblowing testimony whereas Petitioner was to prove the contents of Hearing Exhibit "A".

Accordingly, the U.S. Army at For Hood Texas has never been required by the Courts to rebut the whistleblowing evidence presented by the Petitioner in Exhibit "A".

Page 34 of petition discusses Judge

Malouf's initial decision that Petitioner HAD made a protected disclosure BEFORE he was demoted yet the judge did not require BURDEN OF PROOF be SHIFTED TO THE ARMY at that time as decided by the Appeals Court in Marano v. Dept. of Justice, 92-3132, Aug 4, 1993.

Petitioner contends that conclusions at pages 41-43 of Petition are significantly reinforced by this latest Appeals Court decision.

John R Hall date 9 Sep 93